WHEN ADA & SECTION 504 CHOICES INTERFERE WITH IDEA FAPE

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A note about these materials: These materials are not intended as a comprehensive review of all new case law on Section 504 and the ADA in public schools but as an identification and summary of some of the more interesting trends and issues arising from the last few years. Note that the most interesting cases appear to occur at the border of the IDEA, where the civil rights of IDEA-eligible students are examined and pursued with vigor, perhaps due to the absence of an IDEA reauthorization. The case summaries do not include every issue argued by the parties or conclusion of law by the court. Instead, selected pieces of the decisions are utilized here to explain and illustrate the relevant issues. For ease of reading, quotations will typically not include citations to the record or to other supporting authority. These materials are not intended as legal advice and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read "ED," and to the U.S. Department of Justice will read "DOJ."

In addition to the ADA and Section 504 regulations from ED, and the DOJ and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR March 27, 2009, last modified Oct. 16, 2015), is available on the OCR website at *www.ed.gov/about/offices/list/ocr/504 faq.html* and is referenced herein as "Revised Q&A." In January 2012, OCR released a guidance document on the ADAAA and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter,* 112 LRP 3621 (OCR 01/19/12) (hereinafter "2012 DCL").

I. Background on IDEA-Section 504/ADA relationship.

Section 504 and ADA protections extend to IDEA students because of the high hurdle for IDEA eligibility and the lower hurdle (relatively speaking) for Section 504/ADA eligibility. According to ED, students determined to be IDEA-eligible are also eligible under §504. "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993).

A. IDEA rights and Section 504/ADA rights for the IDEA-eligible student.

By its own language, the IDEA provides that special education eligibility does not foreclose other rights the student may have under Section 504 or the ADA.

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under

this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. §1415(l).

What rights (and limitations) do Section 504 and the ADA add to the mix? OCR provides a nice summary of the applicable rights as follows in response to a complaint in California. *Lodi (CA) Unified Sch. Dist.,* 116 LRP 21759 (OCR 2015) (emphasis added).

> **Prohibition on exclusion from participation and denial of benefit.** "Under the Section 504 regulations … no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."
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> **Equally effective aids, benefits and services.** "The Title II regulations … create the same prohibition against disability-based discrimination by public entities …. A recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.
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> Under both the Section 504 regulations … and the Title II regulations … school districts, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others."
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> **Reasonable modifications in policy, practice, and procedure.** "In addition, the Title II regulations … require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability **unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."** (Emphasis added).
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> **Title II Fundamental Alteration & Undue Burden.** "Whether or not a particular modification or service would fundamentally alter the program or constitute an undue burden is determined on a case-by-case basis. **While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program."** (Emphasis added).

B. An IDEA IEP AND a Section 504 plan for the IDEA-eligible student?

The fact that a student is eligible for Section 504 protections as well as IDEA protections does not mean that he can be served by a Section 504 plan, since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a §504 plan denies the IDEA-eligible student the procedural protections due under the IDEA. OCR's online Q&A addresses the issue quite simply.

> "If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP." Revised Q&A, Question 36.

In other words, a Section 504 plan will not satisfy the school's duty to serve an IDEA-eligible student due an IEP. The IDEA student receives an IEP and is also entitled to the nondiscrimination protections

of Section 504 and the ADA.

C. What about additional aids and services under ADA/504 for the IDEA student?

When a student has a FAPE already developed by way of an IEP, what happens when the parent wants more services or aids and looks to 504/the ADA? The author will address the question first in the context of nondiscrimination generally, and then with respect to specific ADA/504 provisions.

1. Once IDEA FAPE is provided via IEP, is there anything left for §504 and the ADA to do? Given the substantial obligations placed on schools with respect to IDEA-eligible students, it's easy to think that there is nothing left for other laws to provide in terms of protections or services for a special education student's disability-related needs. An examination of the extent of the IDEA's IEP protections is required as the basis of this determination. The IDEA statute provides:

"(i) In general The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel **that will be provided for the child—**

(aa) to advance appropriately toward attaining the annual goals;

(bb) **to be involved in and make progress in the general education curriculum** in accordance with subclause (I) **and to participate in extracurricular and other nonacademic activities;** and

(cc) **to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;**

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);"

20 U.S.C. §1414(d)(1)(A)(i) (Emphasis added). The section continues beyond the quoted language to address access and participation in the state assessment, logistical specifics for the services and accommodations provided, and transition services.

A little commentary: Note that the required IEP elements contain a number of nondiscrimination and equal access-like provisions (highlighted in bold), from curricular access to participation in extracurricular and nonacademic activities. If the IEP is appropriate, note that some non-

discrimination and equal access has already been addressed by the IDEA. Note further that the meaningful benefit/educational benefit standard focuses on the student with disability and her potential rather than on a comparison to nondisabled peers.

2. The impact of IDEA FAPE on Section 504 obligations. Interestingly, unlike the IDEA FAPE with its focus on meaningful or educational benefit (at least until the Supreme Court rules otherwise), the 504 FAPE is an expression of nondiscrimination — a comparison to how well the school meets the educational needs of the average nondisabled student. The Section 504 regulations provide the following "functional approach" to describing an appropriate Section 504 plan or the Section 504 FAPE.

> "For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36." 34 CFR §104.33(b).

A little commentary: To most observers, a special education FAPE is far more valuable and results in far more intensive and individualized services than what is provided to the average nondisabled student to meet his educational needs. In short, services provided via the IDEA FAPE surpass in quality and impact those necessary to meet the educational needs of nondisabled students and, thus, surpass that required by simple nondiscrimination protection under 504.

ED on the overlap of rights. In the context of a somewhat different problem, ED had the chance to explain once and for all how it sees the rights of kids to 504 services when an IEP has been offered but rejected. The question would look something like this: What happens when parents who revoke consent for special education services demand pieces or all of the student's now-rejected IEP delivered by way of a Section 504 plan? The answer is uncertain. When asked, ED said (in the commentary to the December 2008 regulations implementing the revocation of consent rules) **"these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA."** 73 FEDERAL REGISTER, No. 231, December 1, 2008, p. 73,013. In the absence of a direct answer from ED, two schools of thought have developed on the issue.

> **If IDEA FAPE is rejected, 504 FAPE is required.** One school of thought is that a student leaving special education due to revocation of consent should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under §504. "In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). This position is roughly that underlying the *Kimble* decision in Colorado, requiring the 504 committee to offer FAPE under 504 even when the parent had already rejected the offer of a FAPE under the IDEA via an IEP. *Kimble v. Douglas County Sch. Dist.,* 60 IDELR 221 (D. Colo. 2013). Another approach makes more sense, especially in light of the 504 regulations.
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> **The much maligned but really logical *Letter to McKethan.*** The other school of thought is that rejection of FAPE under the IDEA is tantamount to rejection of FAPE under §504 and, thus, schools would have no FAPE obligations under §504 to children whose parents revoked consent to IDEA services, but the student would continue to receive 504's nondiscrimination protection. *See, e.g., Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996) (When parents reject the IEP developed under the IDEA, they "would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that

effectively happened when the school followed IDEA requirements."). For purposes of overlap discussion, that would seem to indicate that an IEP satisfies the school's Section 504 obligation to meet the educational needs of the student with disabilities as adequately as it meets the educational needs of nondisabled students. That position is plainly spelled out in the 504 regulations at 34 C.F.R. §104.33(b)(2): **"Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section [the Section 504 FAPE]."** (Bracketed material added by the author).

A little commentary: The author's suggestion here is not that §504 and the ADA are completely satisfied when the IEP is appropriate, but that §504 and the ADA will have a very limited role in such a situation since all the student's educational needs are deemed to have been met by the offered IEP per the regulation. Unless specific ADA or §504 regulations provide something beyond that available under the IDEA (think effective communication or service animal regulations under ADA), the range of services or accommodations available under 504/the ADA to a student with an appropriate IEP would seem rather narrow.

3. Simple decisions can impact IDEA FAPE. While IDEA students are simultaneously protected by the IDEA, Section 504, and the ADA, the intersection of those laws can result in conflicting duties. We begin with a couple of examples of simple choices (one by the parent, the other by the school) frustrating FAPE.

Choosing the wrong accommodation can impact FAPE. You can use a calculator, just not THAT calculator. *Sherman v. Mamaroneck Union Free Sch. Dist.,* 39 IDELR 181, 340 F.3d 87 (2d Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. **"It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts."** The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires." The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

Accommodations cannot replace direct instruction. *City of Chicago Sch. Dist. 299,* 62 IDELR 220 (SEA IL 2013). The student is IDEA-eligible, diagnosed with autism, multiple learning disabilities, and speech and language impairments. As a result, the student struggles in comprehension of basic math. For example, the student can only count up to the number five, cannot complete most addition and subtraction calculations above a basic level, has problems with visual and spatial reasoning, and is unable to complete basic math facts. **Further, his IEP reflects that his level of performance in basic math skills have not changed significantly since 2010.** In its post-hearing brief, the district

took the position that **"Student will never be able to understand abstract mathematical concepts so that Student could understand the meaning behind basic math."**

The hearing officer was unconvinced, believing that the student's lack of progress was not due to lack of capability but poor choices in terms of teaching strategies and inappropriate accommodations. For example, during a summer of compensatory services provided by a special education teacher (required due to a settlement agreement with the parent arising from an earlier dispute), the student made progress in math.

> "District Summer Teacher testified that by using some of the techniques in multi-sensory instruction, Student was able to make progress on basic math. Moreover, Student's IEPs suggest that 'hands on learning' is a way in which Student can learn. Hands on learning is a key component of multi-sensory researched based instruction. Therefore, the undersigned makes an inference that Student can learn basic math concepts when provided with an appropriate methodology which meets Student's unique needs."

These successes convinced the hearing officer that the student could make better progress on math goals, given appropriate services and in the absence of some inappropriate accommodation. The student's current math teacher testified that the **"Student is currently not being taught basic math skills. Rather, Student is being provided the accommodations to make up for Student's failure to understand basic math in an attempt to teach advance math skills."** Translated: The student is using a calculator to handle basic math skills but does not understand the basic functions handled by the calculator.

A little commentary: While the case is in reverse posture to the concerns we're discussing here (it's the school substituting a calculator for specialized instruction rather than the parent), the case summary is provided to illustrate the negative impact to FAPE that is possible if devices or accommodations are added without concern for the impact on the IDEA FAPE.

4. ADA and Section 504 rights exercised by parents can conflict with the IDEA FAPE. As the two calculator cases illustrated, an improper use of an otherwise worthwhile accommodation can implicate FAPE. When that accommodation decision is made for an IDEA-eligible student outside of the IEP team process, similar conflict is possible. When parents make decisions with respect to whether to send a service animal to school with the student or whether to request a device or service under Title II effective communication regulations (discussed below), the choice can interfere with the IDEA FAPE. A couple of service animal cases and an OCR letter introduce the problem.

A service animal and potential conflict with the IDEA IEP. *E.F. v. Napoleon Cmty. Schs.,* 62 IDELR 201 (E.D. Mich. 2014). E.F. is an 8-year-old IDEA-eligible student, born with spastic quadriplegic cerebral palsy. Her pediatrician wrote a prescription for a service animal, as she requires physical assistance in daily activities. Her service animal is named "Wonder." **Wonder is a Goldendoodle, trained to retrieve dropped items, help her balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc. Wonder also "enables [EF] to develop independence and confidence and helps her bridge social barriers."** Parents allege that Wonder is specially trained and certified, although Department of Justice service animal regulations do not require formal training or certification for service animals. Both before and after a trial period during which Wonder performed without any apparent problem, the school refused to allow Wonder to attend school with the student.

What is exhaustion and why does it matter? The parents sued, alleging violations of Section 504, the ADA, and a Michigan civil rights law protecting people with disabilities. They sought a declaratory judgment, monetary damages, and attorneys' fees. Defendants argued that the parents failed to exhaust their administrative remedies by not first filing for IDEA due process with the

Michigan ED. **"States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts — generalists with no experience in the educational needs of handicapped students — are given the benefit of expert fact-finding by a state agency devoted to this very purpose."**

But the parents didn't argue that the school failed to provide FAPE under the IDEA. Instead, they argued that the school failed to meets its ADA/Section 504 burden to accommodate a student with a disability in a place of public accommodation (the school). The court looked past the parent's legal position, to the implications of the parents' demand on the student's IEP.

> "The Court concludes that IDEA's exhaustion requirement was triggered here. **Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder's presence would not — at least partially — implicate issues relating to EF's IEP ….** It appears conceivable that E.F.'s IEP would undergo some modification, for example, to accommodate the 'concerns of allergic students and teachers and to diminish the distractions [Wonder's] presence would engender.' Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (i.e., the school and school district) would also have to make certain practical arrangements — such as developing a plan for Wonder's care, including supervision, feeding, and toileting — so that the school continued to maintain functionality. All of these things undoubtedly implicate EF's IEP and would be best dealt with through the administrative process." (Emphasis added).

The school's motion to dismiss for failure to exhaust administrative remedies was granted.

A little commentary: While the court understands the potential for conflict with the IEP, the examples cited seem extremely generic — applicable to any student with an IEP. **The author wonders what goals and objectives were in place for the student with respect to independent living, mobility, self-care etc., and how Wonder's service to the child would interfere with the student making progress on those goals.** It does not appear that the district raised the issue or argued any such conflict, leaving the court to speculate. A similar dynamic is sometimes created where the student is not allowed to use skills learned at school. *See, for example, Montgomery County Pub. Schs.,* 23 IDELR 852 (SEA MD 1996) ("The evidence is strongly suggestive that the young adult-soon-to-be in this case may be engaging (not unexpectedly) in a form of 'learned helplessness' while in the home. Skills or behaviors that he independently performs at school or in the work setting are apparently being provided by [ ] in the home. Such actions on the part of the mother or other family members only serve to exacerbate dependencies and prolong the road to independence.").

The 6th Circuit affirmed the *Napoleon* decision. *Fry v. Napoleon Cmty. Schs.,* 65 IDELR 221 (6th Cir. 2015), *cert. granted*, 116 LRP 27666, 136 S. Ct. 2540 (2016). The 6th Circuit agreed with the District Court approach on exhaustion. The rationale embraced by the court is that regardless of the parents' argument that IDEA FAPE was not at issue, their insistence that the service animal be allowed at school evidences their belief that the school's services are inadequate and, thus, an inference of denial of FAPE is inherent in the demand.

> "The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. **The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education.** In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of

dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents …

The primary harms of not permitting Wonder to attend school with E.F. — inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school — fall under the scope of factors considered under IDEA procedures. Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be. The goal falls squarely under the IDEA's purpose of 'ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.' 20 U.S.C. § 1400(d)(1)(A). **Thus developing a working relationship with a service dog should have been one of the 'educational needs that result from the child's disability' used to set goals in E.F.'s IEP.** *Id.* § 1414(d)(1)(A)(i)(II). 'Educational needs' is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s 'academic, developmental, and functional needs,' which means that the IEP should include what a student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). 'A request for a service dog to be permitted to escort a disabled student at school as an "independent life tool" is hence not entirely beyond the bounds of the IDEA's educational scheme.' *Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 248 (2d Cir. 2008). The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F."

A little commentary: The dissent took aim at the speculative nature of the court's concerns. How could the court determine, for example, that the IEP was implicated? "The Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to 'partially implicate' issues relating to education. If flimsy, however, the district court's 'implication' analysis was at least a test. On appeal, the majority offers no useful yardstick at all." In the author's opinion, the majority's recognition of the potential for conflict with the IEP is appropriate (see previous commentary), but so is the dissent's concern with the overbroad result. In the author's mind, the question to be asked here should be "does this service animal interfere with the provision of FAPE for this student?" — a fact question that should be answered in the first instance by the student's IEP team.

The Supreme Court reversed and remanded *Fry v. Napoleon.* *Fry v. Napoleon Community Schools,* 137 S.Ct. 743, 69 IDELR 116 (2017). At the Supreme Court, the focus was on the rights of IDEA students under Section 504/ADA and whether those rights can be pursued without first going through IDEA due process. The case focuses on the impact of the language added to IDEA in 2004 (previously provided on the bottom of page 1). The IDEA language does two things.

"The first half… reaffirm[s] the viability of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.' According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of § 1415(l) …imposes a limit on that 'anything goes' regime, in the form of an exhaustion provision. **According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances–that is, when 'seeking relief that is also available under' the IDEA–first exhaust the IDEA's administrative procedures. The reach of that requirement is the issue in this case." (Emphasis added).**

Both the district court and court of appeals struggled with the connection between the parents' concerns over access and socialization that were addressed by the service animal and the student's right to FAPE as an IDEA-eligible student. "Because the harms to E.F. were generally

'educational'—most notably, the court reasoned, because 'Wonder's absence hurt her sense of independence and social confidence at school'—the Frys had to exhaust the IDEA's procedures. Daughtrey dissented, emphasizing that in bringing their Title II and § 504 claims, the Frys 'did not allege the denial of a FAPE' or 'seek to modify [E.F.'s] IEP in any way.'"

A little commentary: While the court of appeals dissent indicates that the parents did not seek to modify the IEP in any way, there is no serious discussion of what the IEP included or the impact of the service animal on goals and objectives or overlapping services. Interestingly, the Supreme Court includes this snippet. "Under E.F.'s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all of E.F.'s 'physical and academic needs [were] being met through the services/programs/accommodations' that the school had already agreed to." Put differently, if the equal access service animal goes to school, some IEP-required services are no longer required. More on this below.

The Supreme Court explains how exhaustion should work. Looking at the relief available under the IDEA, the Court noted "the primacy of a FAPE in the statutory scheme." That is, FAPE is central.

> **"The IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement.** As noted earlier, any decision by a hearing officer on a request for substantive relief 'shall' be based on a determination of whether the child received a free appropriate public education…. **For that reason, § 1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education.** If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in *Smith* claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act." (Emphasis added).

The focus should not be on the words of the complaint (since artful pleading could simply omit references to FAPE or the IEP). Instead, the court would be looking at the crux or the gravamen of the complaint. The IDEA "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." **So how does one determine the gravamen of the complaint?** The Supreme Court provided the following test.

> "One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking **a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school— say, a public theater or library? And second, could an adult at the school— say, an employee or visitor— have pressed essentially the same grievance?** When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.
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> Take two contrasting examples. **Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps.** In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no

ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education. (describing OCR's use of a similar example). And so § 1415(l) does not require exhaustion.

But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. **But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?** The difficulty of transplanting the complaint to those other contexts suggests that its essence— even though not its wording— is the provision of a FAPE, thus bringing § 1415(l) into play.

A further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings. **In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute— thus starting to exhaust the Act's remedies before switching midstream.** Recall that a parent dissatisfied with her child's education initiates those administrative procedures by filing a complaint, which triggers a preliminary meeting (or possibly mediation) and then a due process hearing. A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE— with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. **But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." (Emphasis added).**

The judgment of the Court of Appeals is vacated and the case is remanded to apply the appropriate test for exhaustion.

A little commentary: While the Supreme Court focused on the central role of FAPE, it neglected the fact that it is the IEP that documents and implements that FAPE. The IEP is the delivery device for FAPE. That IEP includes not only FAPE but the nondiscrimination features of the IDEA with respect to supplementary aides and services to provide equal opportunity to participate in extracurricular and nonacademic activities, as well as the manifestation determination requirement (also arising from 504's nondiscrimination focus. Said the court: "A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule because, once again, the only 'relief' the IDEA makes 'available' is relief for the denial of a FAPE."

Describing again the idea of the crux or gravamen of the complaint driving the exhaustion requirement, the Supreme Court seeks to distinguish the laws at issue.

"In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. **The IDEA, of course, protects only 'children' (well, really, adolescents too) and concerns only their schooling.** And as earlier noted, the statute's goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her 'unique needs.'

By contrast, Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs.

In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 promise nondiscriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes—which is why, as in *Smith,* a plaintiff might seek relief for the denial of a FAPE under Title II and § 504 as well as the IDEA. But still, the statutory differences just discussed mean that a complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." (Paragraph breaks added by the author for clarity, emphasis added).

Unfortunately, while accepting that the laws may overlap, the Supreme Court did not address the issue of a potential conflict between equal access rights and IDEA FAPE. Even on the scant facts of *Napoleon,* it was clear that the service animal would perform functions previously provided by the aide. If the service animal or equal access choice replaces an IEP service, doesn't that mean that the crux of the complaint is the parents' desire that FAPE needs to be provided in a different way, and that exhaustion should be required? Doesn't that mean that the IEP (the vehicle for implementation of the FAPE) is being re-written by the ADA/504 rights of the parents without the rest of the IEP Team?

An interesting concurrence by Justices Alito and Thomas points to the problems with the two-part test. First, the test only works if there is no overlap between the relief available under the IDEA and 504/ADA. Justice Alito writes that once the Court indicates that the same conduct might violate all three laws "And since these clues work only in the absence of overlap, I would not suggest them." Continued Justice Alito:

"The Court provides another false clue by suggesting that lower courts take into account whether parents, before filing suit under the ADA or the Rehabilitation Act, began to pursue but then abandoned the IDEA's formal procedures. This clue also seems to me to be ill-advised. It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide. The parents might be advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another. Or the parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute.

Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray."

The author agrees. Stay tuned….

A service animal and an actual conflict with the IDEA IEP. *Cave v. E. Meadow Union Free Sch. Dist.,* 49 IDELR 92 (2d Cir. 2008). Despite the student's IDEA eligibility, the parent did not allege a violation of IDEA's FAPE requirement but, instead, a violation of the ADA/Section 504 arising from the school's refusal to accommodate their request to utilize a service animal. The 2d Circuit focused on the impact of the 504/ADA equal access request on the student's special education IEP.

"We are not convinced that appellants' claims are materially distinguishable from claims that could fall within the ambit of the IDEA. **The high school principal and the school district's director of special education testified before the district court that John, Jr.'s class schedule under his existing IEP would have to be changed to accommodate the concerns of allergic students and teachers** and to diminish the distractions that Simba's presence would engender. School authorities

would also have to make certain practical arrangements to maintain the smooth functioning of the school and to ensure both that Simba was receiving proper care and that John, Jr. continued to receive necessary and appropriate educational and support services. **It is hard to imagine, for example, how John, Jr. could still attend the physical education class while at the same time attending to the dog's needs;** or how he could bring Simba to class where another student with a certified allergic reaction to dogs would be present. **These issues implicate John, Jr.'s IEP and would be best dealt with through the administrative process.** The local and state education agencies are 'uniquely well suited to review the content and implementation of IEPs ... and to determine what changes, if any, are needed.'" (Emphasis added).

Note that the class change was required as one of John's regular education teachers suffered from serious dog dander allergies. The result was more resource instruction for John as, apparently, no other regular education teacher for that subject was available. *(Author note: isn't this an LRE problem?)* The court further reflected on the goals of IDEA and the impact of the service animal on those goals.

"We note in that regard that one of the goals of the IDEA is 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related *services designed to* meet their unique needs and *prepare them for* further education, employment, and *independent living.'* 20 U.S.C. §1400(d)(1)(A) (emphasis added). A request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is hence not entirely beyond the bounds of the IDEA's educational scheme."

The court noted that the parent's failure to exhaust administrative remedies under the IDEA (the issue was neither raised to the IEP team nor subject of a due process hearing) raised "a serious question regarding whether this Court has jurisdiction to award" the injunction sought. Ultimately, the request was dismissed due to failure to exhaust, but the court addressed the merits to complete the record.

OCR discusses fundamental alteration. *Catawba County (NC) Schs.,* 61 IDELR 234 (OCR 2013). The school argued that the use of a service animal conflicted with FAPE under the IDEA and was therefore a fundamental alteration.

"In this case, OCR need not address what rare circumstances, if any, the use of a service animal could conflict with a student's IEP or 504 Plan and could, therefore, constitute a fundamental alteration. In promulgating the amended Title II regulation, the Department of Justice intended the 'fundamental alteration' exception to be narrow. **Here, there is no conflict between the IEP and the Student's use of the service animal.** Rather, the District has misinterpreted the provisions of the Student's IEP. The Principal and the Superintendent, the decision-makers in this instance, were unable to articulate how the Student's IEP goals conflicted with the presence of the service animal, in large part because they lacked a basic understanding of how the Student's service animal performs its functions." (Emphasis added.)

A little commentary: First, it would be interesting to see OCR's position if an IEP team had looked at the implications to FAPE, done the analysis, and provided the talking points to the principal and superintendent. Would not the case for negative impact be better made by the folks that understand the goals and objectives and "speak" the language of special education? This point becomes significant below as the effective communication joint guidance letter looks to the principal or superintendent to articulate fundamental alteration. Second, while OCR can't imagine a potential conflict between equal access and FAPE, the federal courts (see above) have had less trouble. Further, should a conflict exist, it is the school's responsibility to present the issue in a convincing way.

The remainder of the materials will address what rights are added by ADA & 504 to a particular IDEA-eligible student with respect to school choice, accommodations and services in accelerated

classes or programs (Advanced Placement, Honors, Gifted and Talented, etc.), and effective communication (for a limited number of IDEA-eligible students

II. Equal Access, Choice Schools & Programs

Which schools and programs are we talking about here? Traditionally, the student was educated in a classroom at his neighborhood school. While there might be several classrooms and teachers at her grade level, odds are the student was assigned a teacher and a classroom. The ability to change classes or teachers was governed by the discretion of campus administration. Times have changed. Parent input into choice of teacher is increasingly common, as is transfer among classrooms.

Similarly, as schools have expanded their offerings to provide advanced instruction (advanced placement, honors, gifted, and baccalaureate classes), career-based instruction (magnet schools and academies for the arts, sciences, broadcasting, auto technology, vocational programs, etc.), or programs promoting other interests (for example, specialty athletic or sports teams), choice is added to the mix. In these materials, the author refers to this genre of classes and schools as "choice schools and programs." The focus of this section of the materials is on the Section 504/Title II right of students with disabilities under the IDEA and Section 504 to equal opportunity to participate and benefit in these choice schools or programs despite the student's impairment(s). Specifically, how does parent and student choice interact with the school's responsibility to provide FAPE?

A. Who has the FAPE duty?

One of the major concerns for compliance here is identifying the entity responsible for IDEA FAPE. This is the school system that will be responsible for ensuring not only that the student's rights under the IDEA are protected, but also that the ADA/504 choice under equal access does not negatively impact the special education FAPE.

1. Where the choice school or program is provided by the student's district of residence, or made the student's placement through the IEP. The resident district will have FAPE responsibility both before and after the change for the choice school or program. Consequently, the resident district, through the appropriate Section 504 committee or IEP team, ought to consider whether the parent's desire to place the student in the choice school or program will deprive the student of FAPE. This review could take place upon the parent's application for the school or program or upon the student's selection for the choice school or program via a lottery. Such a review could *(should* in the author's opinion) be added as an eligibility requirement for the district's choice schools and programs. A few appropriate subject areas for the review are suggested below in the context of various types of schools and programs.

Should the results of this individualized review convince the appropriate team or committee that the student could not receive FAPE in the choice program or school, the Section 504 committee or IEP team could reject the placement pursuant to federal law. *See, for example, Douglas County, summarized briefly below.* A finding by the appropriate committee or team that FAPE can be provided to the student in the choice school or program ought to be a required element for admission. Such a requirement would prevent the responsible LEA from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

2. Where the choice school or program is offered by an entity other than the resident district. It's a bit more complicated. Assuming that the resident school district is providing FAPE currently, it has no apparent obligation under federal law to determine the appropriateness of a unilateral school choice by a parent in an entity other than the resident district. Consequently, it would be up to the

entity providing the choice school or program to determine whether the student meets eligibility requirements and whether, once accepted to the program, the student can be provided a FAPE there. Presumably, the nonresident district would want to conduct the same sort of review of the student data and program eligibility requirements outlined above but would do so without the actual knowledge that comes from having served the child. With parental consent, the nonresident district could access educational records of the student from the resident district. Further, with parental consent, the nonresident district could also ask pertinent questions of the resident district's service providers to determine whether the choice school or program would be appropriate. Should the student, based on an individualized review, be determined ineligible for the program because FAPE cannot be provided there, his application could be denied. Such a requirement would prevent the nonresident district from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

3. What about charter schools? If the charter school is its own LEA ... "If the charter school is an LEA, it is eligible to receive a subgrant under the Grants to States and Preschool grants program and, under 34 CFR §300.312(b), it is responsible for ensuring that the requirements of the IDEA are met, unless State law assigns that responsibility to some other entity. Consequently, the charter (absent state law to the contrary) is responsible for its own IDEA compliance. *See, for example, IDEA Public Charter v. Belton,* 45 IDELR 158 (D.D.C. 2006) ("In point of fact, the [Charter] School agrees with the District's argument that, because the [Charter] School has elected to be its own LEA, it is the [Charter] School, rather than DCPS, that bears the responsibility of providing FAPE to its special education students.").

Duties under Section 504. As a recipient of federal funds, the charter school has the same Section 504 and ADA obligations as other public schools. *Boston (MA) Renaissance Charter Sch.,* 26 IDELR 889 (OCR 1997) ("OCR has jurisdiction to investigate this complaint under Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, (Section 504), because Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education, and the school is a recipient."); *See also, Redlands (CA) Unified Sch. Dist.,* 51 IDELR 287 (OCR 2008) ("As public schools, there is no basis in law for Charter schools to waive or obviate their responsibilities under Section 504 and Title II.").

If the charter school is a school of an LEA … "If a charter school is considered a school of an LEA, the LEA must meet the requirement of 34 CFR §300.241 to serve children with disabilities attending charter schools in the same manner as it serves children with disabilities in its other schools and to provide funds under Part B of IDEA to its charter schools in the same manner as it provides Part B funds to its other schools." *Id.* Further, like any other campus or school in the LEA, the failure of this type of charter school in any of the myriad IDEA obligations would be the responsibility of the LEA.

A little commentary: Look to state law to determine whether charter schools in your state act as their own LEAs, are schools of an LEA, or some other arrangement has been made (such as the state acting as LEA for charter schools).

B. Can the IDEA or 504-eligible Student demand FAPE at every campus and in every program?

Given the equal access rights under Section 504 and the ADA, one might assume that a special education student is then free to choose any school or program within the school system or district and thereby require that his IDEA FAPE be provided there, despite the IEP's offer of FAPE somewhere else or, perhaps, *despite the impossibility of providing FAPE in the choice school or program.* ED's Office of Special Education Programs (OSEP) addressed that assumption in 2003. While the letter is in response to questions about private school duties as part of school choice, OSEP lays out the general rule for public schools as well.

> "In your letters, you cite the provision in 34 C.F.R. § 300.552(c), which requires that each public agency ensure that 'unless the IEP of a child with a disability requires some other arrangements, the child is educated in the school he or she would attend if nondisabled.'
>
> I first note that 34 C.F.R. § 300.552(c) was developed in the context of special education programs within local education agency (LEA) schools, and not choice programs. **However, even with regard to LEA programs, the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations."** (Emphasis added).

Letter to Anonymous, 40 IDELR 236 (OSEP 2003). Similarly, the IDEA student's right to school choice typically does not exceed that of his nondisabled peers. *Newark Board of Educ.,* 108 LRP 25367 (SEA NJ 02/29/08) **("Clearly, the determination of which school a student goes to is based either on geographical considerations, in the case of a non-handicapped student, or on program, curriculum and services for a handicapped student who has no greater right to choose which school she goes to than any other student absent, a compelling educational reason.").**

An Example: Centralized services for low incidence disabilities. The federal courts have recognized the authority of SEAs and LEAs to rely upon centralized services for students with low incidence disabilities. In 1990, the 4th Circuit issued its decision specifically recognizing that specialized deaf education services needed by some deaf students can be consolidated in centralized locations — that the school is not required by the IDEA to provide those services on every campus. *Barnett v. Fairfax County Sch. Bd.,* 927 F.2d 146 (4th Cir. 1991), *cert. den'd,* 112 LRP 24728, 502 U.S. 859 (1991). In that case, parents of a student who needed a cued speech interpreter, a deaf education instructor, and speech and language therapists demanded that the services be provided on his home campus. The school board refused to duplicate the services at a school closer to the student's home. The court recognized the significant efficiencies resulting from centralization and adopted the district court's findings of the need for centralization for these specialized services.

> "The district court agreed with the Board and found that in light of the scarcity of highly-trained personnel and resources, the small number of students utilizing the cued speech program, and the educational advantages of centralizing the program at Annandale, the Board had fulfilled the EHA requirements by providing Michael with a cued speech program there .... The program has been established at a network of centrally-located elementary, intermediate, and high schools in order to maximize scarce economic and human resources, particularly qualified interpreters. The school system is not required to duplicate the Cued Speech program for Michael alone merely because there exists a high school which is slightly closer to his house or one he would rather attend ...." *Id., at* 151.

The 4th Circuit affirmed the District Court's decision and its analysis. The court further warned of the important federalism issues inherent in the student's demand. "Adopting plaintiff's position would require us to intrude upon the educational policy choices that Congress deliberately left to state and local officials. **Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local officials are far better qualified and situated than we are to make. Moreover, we believe that when devising an appropriate program for individual students, a school system may consider the feasibility of such a program."** *Id., at* 152. (Emphasis added).

In short, the 4th Circuit found that efficiency and cost have a place in decisions regarding the provision of special education and related services to persons with low-incidence disabilities, and states and local school districts are best suited to address those resource and budgetary concerns. "Because the Act requires the state to establish 'priorities for providing a free appropriate public education to all handicapped children,' we find that congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions." *Id., at* 154. *See also, Roncker v.*

Walter, 116 LRP 26234, 700 F.2d 1058, 1064 (6th Cir. 1983) ("Cost is an appropriate factor to consider since excessive spending on one handicapped child deprives other handicapped children"). *See also, Flour Bluff ISD v. Katherine M.,* 24 IDELR 673, 91 F.3d 689, 694 (5th Cir. 1996) ("IDEA expressly authorizes school districts to utilize regional day schools such as the one at issue here, and we think the importance of these regional programs is obvious. Undoubtedly, there are a limited number of interpreters, speech pathologists with backgrounds in deaf education, and deaf education teachers; and by allocating these limited resources to regional programs, the state is better able to provide for its disabled children. Additionally, by placing these educators at regional centers, those centers are better able to provide further training for those educators and make substitutions for absent educators.").

The 4th Circuit does not stand alone on the issue of state and local discretion in delivery of services. *See also, St. Tammany Parish (5th Cir.), supra; Battle v. Commonwealth of Penn.,* 551 IDELR 629 F.2d 269, 278 (3d Cir. 1980), *cert. den'd,* 111 LRP 66770, 452 U.S. 968 (1981) ("These hard decisions of resource allocation, like the determinations of educational policy are best left to the states, in the first instance."); *Urban v. Jefferson County Sch. Bd.,* 21 IDELR 985, 870 F.Supp. 1558, 1566 (D.C. Co. 1994), *aff'd,* 24 IDELR, 465, 89 F.3d 720 (10th Cir. 1996) (adopting the 6th Circuit's position that the "IDEA is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of school authorities which they review."); *Lachman v. Illinois State Bd. of Educ.,* 441 IDELR 156, 852 F.2d 290, 296 (7th Cir. 1988) ("*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."). Despite the breadth of the IDEA's obligations, local districts retain important discretion.

Of course, centralization can't just result in all students with a particular disability being taught in the same school regardless of severity of disability and individualized need, for such an approach would clearly defy the LRE requirement and would violate FAPE, as placement was not based on individualized determination of need and services. The services at issue in *Fairfax* were scarce, as were the necessary providers. **The logic that allows for centralization of services in *Fairfax* will not apply to special education services that are more common and special education service providers who are relatively more numerous.** Further, the school's argument of personnel shortages will not likely prevail if the school's policies and practices create the shortage. Findings by the DOJ in an investigation of Alabama schools make the point. *In Re: Student with a Disability,* 113 LRP 50627 (DOJ 12/09/13). In the midst of the all-too-common problem of budget constraints (and a resulting shortage of nurses in schools), "the State prohibits school nurses from delegating diabetes care tasks to trained non-nurse school personnel, does not provide for reasonable modifications to the non-delegation policy, and expressly condones unnecessary forced transfers of students with diabetes to a school with a full-time nurse." That dynamic violates the ADA. The DOJ explained that nondisabled students in Alabama attend school with some basic expectations: attendance at a student's zoned school or a school of choice.

> "Indeed, many parents, in selecting a home, place great importance on the school enrollment options for their home's location. And most parents expect that their children will have the opportunity to attend school alongside their siblings and neighbors. The ADA thus mandates that this same benefit be afforded equally to children with diabetes unless it is necessary to provide a different benefit to ensure that the aids, benefits or services of the education program are equally effective."

Unfortunately, even those student with diabetes who are capable of attending a school of choice or their zoned school will not be allowed to do so because of the restrictive policies imposed by the state. In the absence of a full-time nurse,

> "these children are forced to transfer away from these schools …. **This practice impermissibly precludes an individualized assessment of whether reasonable modifications would allow a student with diabetes to stay in his or her zoned school or school of choice without a full-time**

nurse present, in those cases where a parent and a child's physician or other qualified health care professional deem it appropriate to do so." (Emphasis added).

Among the remedial steps required by the DOJ was that the state provide appropriate criteria to consider when determining whether to transfer a student with diabetes for medical reasons.

> "These criteria must state, unequivocally, that the school district cannot force transfers to schools with a nurse, unless it is deemed medically necessary based on an individualized assessment that relies on objective medical data provided by the child's qualified health care professional as to the current health status of the individual child. A child's own qualified health care professional and parent should generally be permitted to determine whether each particular child is able to self-administer insulin, be assisted in administering insulin by trained non-nurse school personnel, or requires the presence of a nurse. **A qualified health care professional's order requiring Glucagon and insulin administration, standing alone, should never be the sole reason for requiring a student to transfer to a school with a full-time nurse, as Glucagon and insulin can be safely administered by trained non-nurse school personnel."** (Emphasis added).

A little commentary: Note that the rationale provided aids our analysis in a couple of ways. Here, it helps schools determine when movement to a particular school is necessary to meet the student's unique medical needs. The same type of thinking applies in determining whether the student's disability needs can be met in a school or program of choice. Put simply, the school's response to an IDEA student's desire to attend a school or program of choice cannot simply be, "No, the student needs special education." Instead, the DOJ's thinking would seem to require the school to conduct an individualized assessment of whether the student's needs for special education can be met in the school of choice.

So, if "the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations" which special education services must the LEA provide in a school or program of choice? The following sections of the materials seek to address that question.

C. Admission & Continued Eligibility for Choice Schools or Programs

1. Otherwise Qualified: Prerequisites and Other Entrance Criteria.

OCR advises schools that "**nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs."** *Rosemount-Apple Valley-Eagan (MN) Indep. Sch. Dist. #196,* 112 LRP 56386 (OCR 03/22/11). To that end, schools are free to create appropriate eligibility requirements or criteria to determine which students should be admitted into the accelerated class or program. **"Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities."** *Id.* Consequently, when the student in *Rosemount* auditioned for Wind Ensemble Band (on the same criteria applied to all band members seeking a spot in the elite band) and was placed by the band director in Varsity Band instead, OCR found no violation.

> "The District has employed eligibility criteria in determining which students are placed in the advanced band. The Student has not met the eligibility criteria despite having the same opportunity to compete for placement in the advanced band. The District has correctly noted that the Student has no identified educational need that would be met by being in the advanced band and is not entitled to placement in that band through the IEP team process."

The IEP team agreed to the parent's request that the student in *Rosemount* would take four honors classes (despite reservations "about any student transitioning to 9th grade with that level of rigor and workload without an Academic Prep course"). There did not seem to be any eligibility requirements

for the honors courses in the district. Nevertheless, OCR reminded the school of the nondiscrimination requirements applied earlier to honors band and now to academic honors classes:

> **"Similarly, if the District has established eligibility requirements or criteria for honors courses, the Student has no identified educational need being met by placement in those courses and should only be admitted to those classes if he meets the same criteria in place for other students in the building.** The Student is entitled to the same opportunities to compete for and benefit from honors courses, not a preferential opportunity based on eligibility for special education and related services." *Id., (Emphasis added)*.

A little commentary: One problem with the "no entrance criteria for honors course" approach is that it seems to negatively impact the school's ability to later say that a student, now failing such a course, is ill-equipped to be there. Legitimate criteria solve that problem, to some degree, by making sure the students in the program are qualified to be there. A host of older cases provide additional illustration.

An example of appropriate criteria. *New York City Sch. Dist. Bd. of Educ.,* 17 IDELR 87 (SEA NY 1990). An 8-year-old student with a learning disability sought, among other things, admission into the school's gifted and talented program. The parent alleged that the student was excluded from the program due to disability. At hearing, the school demonstrated that entry into the gifted and talented program is eligibility-based. To gain entry, students must show: (1) above-average ability; (2) evidence of creativity; and (3) task commitment. While the student showed above-average reading ability, he did not exhibit outstanding achievement in other academic areas such as science, social science, writing, or language. His lack of outstanding performance in math was expected based on his learning disability in math. With respect to creativity, the teacher indicated that he is "as creative as any other second grader" and that he does not "add embellishments [to his work] which would indicate the creativity for which the program is targeted." Finally, on the commitment requirement, the teacher indicated that when given an assignment the student was often slow to start work and then frequently meandered off-task. **The district believed that the commitment requirement was especially important because students in the program would not only be required to do gifted and talented assignments, but do make-up work missed when attending the gifted and talented pull-out.** The hearing officer found no discrimination.

A little commentary: It seems clear that the child's disability was considered in the eligibility analysis. The hearing officer paid careful attention to note that the student was not required to demonstrate excellence in math where his disability had great impact. The district's criteria required above-average ability in more than one area, but not in all areas. The implication is that had the student demonstrated above-average ability in more than one area (math not included), he would have met the first requirement. Nondiscrimination cannot mean that a student with a learning disability in math is precluded from gifted and talented programming in language arts, for example, if otherwise eligible. Of course, this student was still not eligible due to the other two requirements.

A nice mix of eligibility factors is helpful. *St. Charles (Ill) Cmty. Unit Sch. Dist. #303,* 17 IDELR 910 (OCR 1991). An OCR complaint was filed by parents of a student with behavior disorders who was denied access to the district's Academically Talented Program (ATP). Eligibility in the program was partially governed by Illinois state law, which required admission to be based on at least three factors, such as achievement tests, intelligence tests, creativity measures, teacher recommendations, samples of student work, and parent recommendations. State law also required an evaluation of classroom performance. Students were first screened for a Preliminary Talent Pool, consisting of kids currently in AP classes, other districts' gifted classes, or fast-paced math. Likewise, students with sub-scores in the 90th percentile or above on any section of a standardized achievement test or students with IQ's at 125 or above on individualized intelligence or mental abilities tests were placed in the pool. Finally, teachers and principals could place students in the pool.

Once in the pool, students were given an identification matrix. Each of three criteria (achievement test scores, IQ scores, and teacher recommendations) was given points up to a maximum of 8. The three areas were added together and students with composite scores of 20 or higher got into the program. The student at issue here (who attempted to access ATP classes in science and social studies) earned a total matrix score of 15, with no points from the social studies teacher. Teacher recommendations were based on a checklist that focused on mastery of academic and learning skills, like originality, abstract thinking, ability to express oneself orally and in writing, and consistent achievement above grade level. He was denied entry to the ATP and instead placed in Advanced Placement classes that were described as classes for students with slightly less ability that ATP. In those AP classes, he failed all subjects except for music and art. "There is no indication that nonacademic factors such as discipline problems were considered by teachers in the evaluation process." OCR found no violation.

A little commentary: By providing multiple avenues for entering the talent pool, the district ensures that the lack of any one factor would not preclude the student's consideration. **Put a different way, single factor eligibility looks perilous.** For example, in *Darien (CT) Board of Education,* 22 IDELR 900 (OCR 1995), OCR rejected the parents' allegation that a student with a disability was denied access to gifted and talented classes due to his IQ score. Instead, OCR found that participation in honors programs was based on recommendations by the department chair, in consultation with classroom teachers and guidance counselors. The implication seems to be that if eligibility is based solely on IQ (or presumably any other single factor), OCR would be concerned.

Writing requirement for a high school magnet school upheld. *C.O. v. Portland Pub. Schs.,* 58 IDELR 272 (9th Cir. 2012), *cert. den'd,* 113 LRP 786, 133 S. Ct. 859 (2012). An IDEA-eligible student reading at a third-grade level was denied access to the district's magnet high school due to his failure to meet the minimum requirement of performing at eighth-grade benchmarks. Wrote the court:

> **"'Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate,' but merely requires them not to exclude a person who is 'otherwise qualified' based upon his or her disability.** To be 'otherwise qualified,' an individual must be 'able to meet all of a program's requirements in spite of his handicap.' … Though we do not read this to give schools leave to adopt requirements that are not reasonably related to the program at issue, we 'extend judicial deference to an educational institution's academic decisions in ADA and Rehabilitation Act cases.' **And it is not unreasonable to require a minimum of eighth grade proficiency from anyone who is applying to a magnet high school."** (Internal citations omitted). (Emphasis added).

So, no violation where student's composite score was not high enough. OCR investigated a New Jersey district that had not accepted a student with a disability into its Gifted and Talented program. Admission to the program was based on "multiple measures, including a standardized achievement test, the Test of Cognitive Skills, the student's cumulative record averages, a teacher/school nomination form, student interest inventory and self-nomination forms, a verbal interview and review of records, and an on-site demonstration depending upon the program area." The student at issue was a fourth grader diagnosed with anxiety (panic attacks) and ADD. The student applied for the program and was considered based on the data previously described. Like all other students, the student with a disability was given a composite score based on a review of the data by multiple reviewers. Upon review of the scores, OCR determined that **no student with a score lower than the complainants was admitted** into the program. Likewise, **several nondisabled students with scores better than complainant were not admitted.** OCR determined there was insufficient evidence to establish that the student had been denied admission due to disability. *Bayonne (NJ) Sch. Dist.,* 35 IDELR 36 (OCR 2001).

A little commentary: OCR noted that the student did not have a formalized 504 plan that would have required the district to provide modified testing or services during the application/testing process. The

implication appears to be that the student was appropriately assessed for program eligibility. Second, OCR reviewed each grader's scores and interviewed each to determine whether the student's disability played into the decision. Several graders indicated that they had no knowledge of disability, others stated that the student told them she had an aide, but the graders reported that they did not consider that fact in their assessment of the student. Finally, it was helpful in the analysis of the composite scores that nondisabled students who scored higher than the complainant were not admitted, no one scoring lower than complainant was admitted, and that a student with asthma (and a higher score than complainant) was admitted. **In short, while it is nice to say that the decision is not based on disability, it's even better when the data supports the same conclusion.** A final thought: Doesn't it seem a tad counter-productive to push a kid with panic attacks into a high level gifted curriculum, where competition and expectations are dramatically increased?

And no discrimination where the student lacked a required credit in math … *Horry County (SC) School District,* 35 IDELR 39 (OCR 2001). **… or when the student enrolled late, the program was full, and he did not fill out the application.** *Southfield (MI) Pub. Schs.,* 112 LRP 28804 (OCR 04/23/12).

A little commentary: Schools should consult the school attorney for concerns about the entrance criteria currently in use in the schools or to review criteria to be adopted. Preclearance of your criteria from OCR can also prove helpful and provide peace of mind.

Open Enrollment & Lottery Admission. The fact that the choice school or program may not be a good match for the learning style or skills of a given student (whether disabled or nondisabled) means that parent and student choice, unchecked by appropriate eligibility criteria (and unchecked by IEP team/504 committee approval based on FAPE) can result in lost educational opportunity. It is not uncommon to see students perform poorly in choice programs accessed via open enrollment or lottery results. When the student fails to succeed in the choice school or program, school personnel will often tell the parent that the school or program is not a good fit and the student ought to return to the previous educational setting. It seems a tremendous disservice to students to ignore criteria for admission that could avoid this result.

2. IEP team & Section 504 committee review as part of enrollment and entrance criteria.

No magnet school where IEP Team determined a collaborative kinder program was required. *In Re Student with a Disability,* 105 LRP 13107 (SEA VA 09/22/04). A prekindergarten student eligible under the IDEA due to developmental delay (verbal and fine motor apraxia) had limited use of fingers and hands, could not communicate orally, and had difficulty with nonverbal communication as well. The school proposed a kinder classroom with disabled and nondisabled students, a special education teacher providing consult services, a one-to-one aide, and occupational therapy and speech language therapy. The parent preferred placement in a magnet elementary school where the student gained entry through a lottery. **Even "though [Student] 'won' the lottery for [the magnet school] and would be accepted there, his IEP requires a collaborative kindergarten program that [the magnet school] does not provide. Therefore, [Student] would not be accepted there without a change in his IEP, and the IEP committee will not change the IEP from requiring a collaborative kindergarten program for [Student].**" (Bracketed material added by author). To gain access to the magnet school, the parents challenge the school's proposed placement in the collaborative setting as a violation of LRE. The hearing officer rejected the challenge based on the student's need for services. Note that neither the school's proposed elementary program nor the parent's desired magnet program is the school the student would attend if not disabled.

> "[The student] has been in the preschool environment through the 2002-03 school year, which is a self-contained special education setting. The **collaborative kindergarten environment** is intended to provide the special education student with a year of transition experience when moving from

preschool to kindergarten. The special education students are not separated from the nondisabled students in the classroom. **The classroom is a regular education classroom, with a special education teacher and an aide for the disabled students.** A one-on-one aide alone, with the general education teacher, could not provide the services that can be provided by the special education teacher. The latter has the special training to insure that the proper modifications and accommodations are afforded the special education student. An aide alone could not accomplish that service." (Emphasis added).

As to the LRE challenge, the hearing officer writes: "The definition of 'educational placement', although reflecting the term 'mainstreaming', does not include the precise physical location where the student is educated. The LRE directs that the student be assigned to a setting that resembles as closely as possible the environment to which he would be assigned if he weren't disabled." The June 9, 2004, IEP was affirmed, and the student was assigned to the collaborative kindergarten program as the school had proposed.

Student's unique academic and social needs can't be met in the choice high school. *Washoe County Sch. Dist.,* 36 IDELR 80 (SEA NV 2002). A high school-aged student diagnosed as "developmentally disabled" and eligible under the IDEA complained of a variety of harassment-like incidents at her regular high school. The student had performed well in her modified classes, earning A-B grades. "She liked her teachers very well and liked her classes." Apparently prompted by the incidents, the parent sought placement of the student at Truckee Meadows Community College High School. A memorandum prepared for the IEP team explained the purposed and structure of TMCCHS and questioned whether this choice was appropriate for this student.

"The classes offered at TMCCHS are rigorous college level academic courses. It is an advanced, accelerated academic program for students who are ready for college level coursework. **Brianna's goals are not commensurate with the courses available at TMCCHS or the mission of our program, which is to assist students who are academically prepared of the unique challenges of a college curriculum.** It is Washoe County School District's responsibility to implement IEP's developed for students and provide specialized instruction, supplementary aides and services required for that student. Brianna's IEP can be implemented by specifically addressing the functional living skills with specialized instruction perhaps through a work internship and vocational classes available at Washoe County School District's comprehensible campuses. In that setting, Brianna would also have to have access to a curriculum appropriate for her IEP goals and the social experience per her IEP. **Please note that TMCCHS has the least opportunity for social interaction of all Washoe County School District schools due to the unique college structure and setting of our high school student's schedules."** (Emphasis added).

In fact, the school operates much more like a college campus than a high school. **"TMCCHS does not have typical high school programs such as assemblies, clubs and athletic events. There are essentially four events that occur throughout the year that are social in nature including an introduction at the inception of the semester, a prom, a barbecue at the end of the year, and then graduation. There is no direct campus life at TMCCHS. There is no lunchroom, no snack time, no high school campus cafeteria and classes meet generally three times a week."** For a student working on social skills, the hearing officer ruled that a regular high school was the appropriate placement.

Student's unique behavioral needs can't be met in magnet. *Metro-Nashville (TN) Pub. Sch. District,* 38 IDELR 18 (OCR 2002). A student identified as emotionally disturbed under the IDEA had a history of verbal and physical aggression toward staff, other students, and herself.

"She throws objects at staff and students, uses profanity, drops books loudly on the floor to gain attention, is disruptive on the bus, and becomes very angry and defiant when asked to complete classroom assignments or is not called upon to answer a question in class. Sometimes these actions

escalate to unsafe levels. The Student's disciplinary history shows infractions for disrupting the learning environment, breaking school windows after becoming angry with a teacher, leaving the building, and use of vulgar and obscene language toward staff."

When the middle school behavioral setting proved ineffective to address the student's anger issues, the IEP team determined

> "that her needs could best be met in the Severe Behavior Intervention Program (SBI Program) which is offered at the Murrell School (Murrell). The Complainant participated in the January meeting and agreed with the change in the Student's educational placement. Murrell is the District's only self-contained special education facility that specializes in working with students with severe emotional and behavior disorders. It has an enrollment of approximately 60 students. There is a psychologist and a social worker assigned to Murrell who work with the students. In addition, each classroom has only 3 or 4 students, with a teacher, an aide, and a counselor. Students remain at Murrell until an IEP team determines that a student's behavior has improved and they can return to their zoned school."

The parent complained when the student won admission via lottery to Head, one of the district's magnet schools.

> "Students in grades 5-8, with an interest in math or science, can apply for entry-level positions. All applicants are put on a waiting list and a random lottery is used to fill vacancies. Applicants are assigned a random lottery number and are notified by mail of the result. Parents must sign and return the acceptance letter before a student is enrolled. Not all students who are sent acceptance letters choose to attend the magnet schools. There are instances when, even though eligible, students choose to remain at their sending school. If a student with a disability's IEP can be implemented at Head, they are enrolled …. Since the Student wanted to attend Head, the Complainant met with Middle School personnel and the Student's IEP was reviewed …. **Although selected for possible enrollment at Head, it was determined that the behavior intervention strategies identified in the Student's IEP could not be implemented at Head; therefore, it was determined that the Student needed to remain in the MIP setting at the Middle School.** Evidence shows other students with disabilities are attending Head. Therefore, there is insufficient evidence to support a violation of Section 504 and Title II with regard to this allegation."

Doesn't the choice school or program's structure, teaching method, school environment, etc., require consideration to ensure the student's FAPE needs can be met there? As both the *Metro-Nashville* and *Washoe County* cases described previously point out, the IEP team/504 committee needs to understand the choice placement in order to determine if FAPE is possible there. Some schools and programs are designed to provide instruction in a manner different from the traditional schoolhouse. Consequently, the demands of the choice school or program may require skills and resources lacking in some students (both disabled and nondisabled).

Better late than never — the IEP team review came after the cyber school placement. *Douglas County Sch. Dist. RE-1*, 109 LRP 32980 (SEA CO 01/12/09). After a student requested placement in an online charter school authorized by the district, the program allowed the student to participate in the online program by means of written work while her application was being processed and an IEP team convened to determine whether the program was appropriate to confer FAPE. After the IEP team determined that the program could not meet the student's needs for direct instruction with only consultative services in addition to the online program, the parent complained to the SEA. The SEA found that the district was required to ensure that FAPE was provided in the three-week period during which the application and IEP meeting process took place. Instead, the student had neither full access to the online program, nor to her required special education services. Thus, the student was entitled to 20 hours of compensatory education from a special education teacher (although the parent indicated she did not want such services, as the student was enrolled in another full-time online program).

A little commentary: Here, the problem appeared to be that the district allowed the parent to go to the virtual school to enroll a child who was new to the district, as she resided in another. **Instead of offering services comparable to her current school-based IEP in a campus setting while the IEP team gathered data to determine if the online program was appropriate for her, she was allowed to enroll in the online program although she could not access the computer system while her application was pending.** The district could have insisted that the student attend school under a comparable services temporary program while the application was being considered. Or, if the parent wished, the student could have remained in her home district while the application process and IEP team meeting could be finalized. From a policy standpoint, an online school's policies should require that applying students remain in their resident district or assigned campus until the online program accepts the student and the IEP team has approved the placement. A finding by the appropriate committee or team that FAPE can be provided to the student in the online program ought to be a required element for admission. Such a requirement would prevent the responsible LEA from being required through choice to provide something less than FAPE to a Section 504 or IDEA-eligible student.

D. Services once the student with disability is enrolled in the choice school or program.

1. Transportation.

OCR and the courts have a clear difference of opinion on the school's responsibility to transport a student with a disability to a choice school or program. A fairly common requirement in choice programs and schools is recognition that the LEA has already provided FAPE at the school's proposed setting. Consequently, parents are typically advised in writing that their decision to move the student to a choice school or program will require the parent to transport the child.

OSEP, school choice, and transportation as a related service. *Letter to Hakola,* 34 IDELR 62 (OSEP 2000). Michigan state law creates a framework for parents to access schools of choice. Part of the state law expressly exempts a choice school from providing transportation to nonresident students UNLESS the student receives transportation as a related service. OSEP finds compliant the state practice as described in a Q&A on the Michigan school choice law.

> "'Is the enrolling district under a Section 105 schools of choice program responsible for providing transportation for the nonresident pupils?' The answer states: 'No, however the district must provide the parents of the nonresident pupil with information about transportation options. If the nonresident pupil is a special education pupil and the IEP (Individualized Education Program) indicates special transportation, then that transportation must be provided.'"

A little commentary: OSEP finds this interpretation consistent with IDEA-B. Note that since the state of Michigan had not addressed the Section 504 implications, OSEP indicated it would seek further clarification. The author's expectation is that transportation as a related service under Section 504 would be treated similarly to transportation as a related service under the IDEA. *See also, Attleboro Pub. Schs.,* 109 LRP 72939 (SEA MA 09/29/09) (Nothing in the record suggests that the student needs transportation as a related service. Student's attendance at another elementary is due to parental choice, and they had ample notice that the choice would require the parents to transport the child to the choice school. "In a sense, here parent received their placement of choice in exchange for providing transportation, all of which occurred outside the Team process.") It is also possible to recognize that state law can change this result.

Choice and transportation as a related service as viewed by a federal court. *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.,* 30 IDELR 535 (8th Cir. 1999). An IDEA-eligible student with cerebral palsy, spastic quadriplegia, and other impairments wished to access a choice school through the district's intra-district transfer program. The student receives special transportation via a lift-bus.

However, district policy indicated that the district would not transport students attending choice schools under the policy. The parents do not dispute that FAPE is provided at the district's proposed school but prefer the special education program at the choice school.

The school estimates that it would cost $24,000 per year to provide the lift bus and the special route for the student to attend the school of choice. The court's concern is that the parents, by demanding transportation, "do not wish to comply with the main condition of the program applicable to all students who wish to participate — parental transportation." **The court finds both an undue burden and fundamental alteration.**

> "… even assuming the school district were required to modify its transportation policy to accommodate Kratisha's disability, the suggested accommodation considered by the district court — establishment of a special bus route for Kratisha — is an undue financial burden and a fundamental alteration in the nature of the intra-district transfer program. ... **Further, requiring the school district to spend any amount of money to provide transportation to students participating in its intra-district transfer program would fundamentally alter the main requirement of a program designed to be of no cost to the school district — parental transportation.** In short, establishment of a special bus route for a single student who admittedly receives a free appropriate public education at her neighborhood school, but who wants to go to another school for reasons of parental preference, is an undue burden on the school district." (Emphasis added).

The court found that even if the elements of a 504 claim had been made, "the suggested accommodation would constitute an undue burden on the school district."

A little commentary: One sticking point between ED and the federal courts is ED's insistence that FAPE is not limited to reasonable accommodation. A related difference is ED's belief that undue burden is rarely an appropriate defense for a public school district since public schools are taxing entities. The federal courts do not share those perspectives. Note that for school's wanting to comply with both the federal courts and ED's views of ADA/504, satisfying OCR's higher expectation of compliance will meet the lower federal courts' less onerous expectations.

2. Access to special education services in choice programs and schools.

Recall that OSEP has counseled that "the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations." *Letter to Anonymous, supra*. That said, schools cannot arbitrarily deny students with disabilities access to choice programs or schools or design such programs in a way that will categorically exclude students with disabilities.

Waiving most IDEA services to get into a magnet program? *Chattanooga (TN) Pub. Sch. District,* 20 IDELR 999 (OCR 1993). Admission to the district's magnet schools provides access to a general liberal arts course of study, with significant amounts of independent and group work. Applicants gain admission based on four criteria:

> "A. An admissions procedure based on zone, gender, and race is used in order to maintain an appropriate mix of students necessary for a representative and diverse student body.
>
> B. The willingness of parents/guardians to actively participate in the educational experience of their children by providing at least 2 hours per family of volunteer time per month to the school and by helping ensure the child(ren's) academic and behavioral success. All parents must attend at least two parent/teacher conferences per year.
>
> C. The commitment of the student to undertake the demands of the curriculum to the fullest of his/her potential.

D. The capacity to function without special education services, other than speech, hearing and vision services."

OCR was troubled by the sweeping nature of Provision D.

> "The policy precludes the provision of special education services thereby discouraging the enrollment of students with disabilities in the programs of these magnet schools. At the present the only students enrolled in these programs with special needs who are receiving services are students who have speech, hearing and vision disabilities and students who have ADD or ADHD. **While the District indicated that students with special education needs could be accommodated through the method of instruction used in the magnet programs, it is unclear how this would be done since parents/guardians of the eligible students must sign enrollment forms waiving the right to any special education services other than speech, hearing or vision, and IEP's are not developed or implemented for any students other than those who have speech, hearing or vision needs."** (Emphasis added).

To correct the violation, the district was required to eliminate Criteria D. Instead, "qualified students with disabilities who meet the other eligibility requirements for enrollment in the magnet programs will be assessed and provided with regular or special education and related aids and services designed to meet their individual educational needs." With respect to students with disabilities currently participating in the magnet schools, the schools agreed to conduct a record review to determine whether any of these students are not receiving FAPE. If so, the school "will evaluate those students and provide them with regular or special education and related aids and services designed to meet their individual educational needs."

What if the IEP is simply changed to reflect what the choice school can provide (but NOT reflect the services the student actually needs)? Bad IDEA. *Lodi (CA) Unified Sch. Dist.,* 116 LRP 21759 (OCR 11/04/15). A fourth-grade student on the autism spectrum and IDEA-eligible was denied special education services necessary for his individualized needs at the district's GATE school serving gifted and talented students. While not a matter of written policy, the district does not provide certain special education services, including special education resource support teachers, at the GATE school.

> "In this case, the District did not base its decision to eliminate direct resource support from the Student's IEP based on his individual needs. Instead, the evidence showed that the only reason the IEP team changed the services was because of the District's practice to not provide these services at the GATE School. The District cannot refuse to provide students with disabilities with a FAPE or limit the regular or special education and related aids and services students are entitled to receive without an individualized determination based on the needs of the student with the disability. Witnesses' explanation for not providing certain services at the School — that it is a 'school of choice' –is insufficient to overcome the District's Section 504 and Title II obligations."

Note that the violation found by OCR was the failure to provide special education services to qualified students at GATE "*without consideration of their individual needs."*

When the virtual or cyber school restrictions on special education services go too far. *Quillayute Valley (WA) Sch. Dist. No. 402*, 49 IDELR 293 (OCR 2007). A Washington district contracted with a public online school to offer a virtual program to some of its students. The virtual program, however, applied written criteria to prospective applicants with disabilities. Particularly, the criteria set forth the following services and accommodations it would *not* provide to applicants with disabilities:

- modified curriculum
- counseling to address behavior goals

- translator support
- paraeducator support
- more than 40 minutes per week of special education instruction
- certain assistive/adaptive technology
- extended time beyond six weeks past closing to complete work
- tutoring

In addition, the program also applied unwritten criteria to applicants that precluded students with disabilities from admission if they had a documented (1) inability to compete schoolwork independently, or (2) reading or writing ability level below 6th/7th grade. The unwritten criteria were not applied to nondisabled applicants. The program denied admission to an applicant with behavior goals, a behavior plan, a need for special education instruction of 275 minutes per week, a lack of ability to perform independently, and lower reading/writing abilities, which led to an OCR complaint. **OCR found that the criteria worked to deny admission to applicants with disabilities solely on the basis of disability by categorically disallowing particular services, accommodations, and supports.** It also found that the criteria in question were not "reasonably necessary to achieve the mission and goals of the education program." In applying its unwritten criteria only to applicants with disabilities, OCR found that the program treated them differently than nondisabled applicants.

A little commentary: Certainly, application of a categorical exclusion of a variety of services, supports, or accommodations as part of admission criteria will be found discriminatory on the basis of disability from an access and equity standpoint. But it bears noting that the unwritten criteria on the student's documented ability to work independently is a factor that would appear to be reasonable for IEP teams and 504 committees to determine if the online program is appropriate to meet the student's needs. Moreover, such a criteria could be legitimately related to a written program goal to increase self-motivation, self-discipline, and the ability to work independently. Thus, virtual programs may want to articulate such goals in their written policies and admission criteria. Lastly, admission criteria that are applied only to students with disabilities and not across the board to all applicants are likely to be seen as discriminatory treatment in violation of §504 and, likely, the IDEA.

What about voucher programs? Long-standing OCR guidance crafted originally for Milwaukee's choice program in 1990 and applied more recently to Florida's McKay Scholarship voucher program for students with disabilities addresses the obligations to provide FAPE when students utilize the vouchers in private schools. *Pinellas County (FL) Sch. Bd.,* 102 LRP 12729 (OCR 03/20/01). Where the Florida ED (FDE) and its local school districts

> "have made FAPE available to eligible children with disabilities in a public school but their parents elect to place them in private schools through the Scholarship Program, then such children are considered 'private school children with disabilities' enrolled by their parents. Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements." (Internal citations omitted)

Note that Section 504 and ADA Title II duties apply to the FDE's administration of the voucher program. While the FDE does not have to ensure that these students receive an IEA FAPE, "it must ensure that participating private schools do not exclude a Scholarship Program student with a disability 'if the person can, with minor adjustments, be provided an appropriate education within the school's program.' 34 C.F.R. §104.39(a)." Further, the student privately placed through this program would still be entitled to IDEA's proportional share.

> "This means that those children with disabilities attending participating private schools through the Scholarship Program must be considered for any limited special education and related services that may be available to them in light of the available funding and the total number of private school

children with disabilities and their needs, in the same manner as other children with disabilities enrolled in participating or nonparticipating private schools."

In June of 2016, the Council of Parent Attorneys and Advocates (COPAA) released a report on voucher programs that analyzed the usage of such programs by students with disabilities together with the benefits and concerns raised by vouchers under the IDEA, Section 504, and the ADA. Almazan, S., Marshall, D. (2016). *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice,* Council of Parent Attorneys and Advocates. Principle among the concerns in the report are the relinquishment of IDEA rights when vouchers are utilized to attend private schools, lack of accountability by private schools accepting voucher students, and little explanation to parents about IDEA rights are lost and those that remain under Section 504, the ADA, and other civil rights laws. Among other proposals for both state and federal regulators, COPAA encourages ED to provide guidance to "clarify civil rights violations that may be linked to failure to provide a free and appropriate public education under Section 504, or equal access under the ADA." *Id., p. 17.*

A little commentary: Note that advocacy continues to look for Section 504 remedies when the IDEA fails to provide the desired benefit. Here, where IDEA FAPE is gone, the push is for ED to remind parents of the Section 504 FAPE as a replacement. This is an issue to watch.

E. OCR/OSEP Guidance on IEPs in Accelerated Classes.

Any discussion of accommodations and services in accelerated classes (here, shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated Dec. 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the *other* assumption, commonly articulated by some parents, that students with disabilities are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the "accelerated" nature of the class. The letter does seem to recognize limits to accommodations but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (OCR 12/26/07). Note that state laws that may provide additional requirements are not addressed here. Check with your school attorney.

1. IDEA & §504 students do not give up their services and accommodations as a condition of attendance in accelerated programs.

In its December 2007 letter, OCR focused on two major concerns with respect to disability discrimination in accelerated programs. **"Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs. These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur."** *Id* (Emphasis added). Further, "conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504." *Id.* OCR has enforced this position in *Wilson County (TN) School District,* 50 IDELR 230 (OCR 2008) ("The evidence shows that the District's decision was based on an erroneous interpretation and application of Section 504 requirements that resulted in an automatic denial of academic

accommodations for the student in his honors class."). This letter of finding is discussed in greater detail below.

While OCR's declaration that accommodations are required in accelerated classes is not surprising (the notion that no accommodation would ever be required in an accelerated class seems indefensible in the context of a law that seeks equal participation and benefit in a recipient's programs and activities), OCR takes the position that accelerated classes are "generally" part of FAPE. That position is interesting, as it means that accommodation in accelerated classes is not then subject to the limitations of "reasonable accommodation" but is governed by the higher FAPE standard.

> "Participation by a student with a disability in an accelerated class or program ***generally*** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations. **Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.** For example, if a student's IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes." *Dear Colleague, p. 3.* (Emphasis added).

So, what does this mean?

1. Accommodations or services the student receives through §504 or the IDEA in a regular education class or program are available to the student in an accelerated program.

2. As a corollary, a student with an IEP or §504 plan cannot be denied access to an accelerated class or program because he has an IEP or §504 plan, nor can the student's admission to the accelerated class be conditioned on the student giving up accommodations or services he receives from a 504 plan or IEP.

As OCR concluded, "the requirement for individualized determinations is violated when schools ignore the student's individual needs and automatically deny a qualified student with a disability needed related aids and services in an accelerated class or program." *Dear Colleague, p. 3.; Wilson County (TN) Sch. Dist.,* 50 IDELR 230 (OCR 2008) (OCR finds a §504 violation when the school refused to apply a student's existing §504 academic accommodations to his honors classes, including extra time on class work, homework, and routine classroom tests, although he continued to receive the plan's accommodations in his regular classes).

3. There is no indication in the OCR analysis/guidance that the student must be provided additional accommodations or services due to his participation in accelerated classes.

On the contrary, **the example provided in the OCR letter clearly envisions that the accommodations that the student was already receiving in regular classes will be those she receives when she enrolls in an accelerated or advanced history class.** Consequently, a student who wants additional accommodations (beyond those she currently receives) in order to tackle the more difficult subject matter, speed, or coverage of the accelerated course would appear to have no entitlement to expanded accommodations based on the move to an accelerated class. Unfortunately, this was the only example provided by the 2007 letter, so whether this limitation is intended or is an unfortunate implication of the chosen example is unclear. Note, however, that in the *Wilson County* case, the result seems to follow that in the example. OCR's concern in *Wilson County* was that accommodations in the student's plan at the time he began accelerated classes were not applied to the accelerated classes. A clear statement of this rule from OCR would be helpful, especially as

schools are confronted with parents demanding additional supports in the face of more difficult demands in accelerated classes.

4. There appears to be no concern over whether the accommodations or services provided in the regular class, when provided in the accelerated class, will still be appropriate.

Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter. Accelerated classes typically move at a faster pace, involve more reading and writing, and can be otherwise more intense versions of their regular education counterparts. In some cases, these classes may also expose the student to curriculum in excess or above a grade-level class of the same subject matter and may offer weighted grades to encourage participation and in recognition of the greater difficulty of the material. **Strangely, OCR treats grade level curriculum and accelerated curriculum as identical (although there may be significant differences).** While in other contexts OCR recognizes that remedial and special education classes may offer below-grade level curriculum and accelerated classes may offer above grade level curriculum, OCR acknowledges no difference in curriculum level in this analysis on accommodations. (*See, for example,* OCR guidance on notations to transcripts to indicate classes with modified or alternative education curriculum, *In Re: Report Cards and Transcripts for Students with Disabilities,* 51 IDELR 50 (OCR 2008) (**"While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements.** Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction, which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II.") (Emphasis added)).

OCR appears to assume here that accommodations appropriate in a regular class will not (regardless of the type or scale of the accommodation) take away from the accelerated nature of the class and thus potentially provide the accommodated student with weighted credit for mere grade-level work. The possibility is not directly addressed in the OCR letter (unless that is the implication of the word "generally" in the 2007 Letter).

2. OCR's View

Doesn't an academic accommodation make an "accelerated" class a "regular" class, constituting a fundamental alteration? Perhaps, but not this time … *Wilson County (TN) Sch. Dist.,* 50 IDELR 230 (OCR 2008). While not prevented from enrolling in honors courses, the school mistakenly refused to allow a Section 504 student with ADHD and OCD to receive his §504 accommodations in honors classes. During the 2005-06 school year, the student was determined eligible for §504 to address the student's difficulty focusing on and completing work and "expending extreme amounts of time" on homework that negatively impacted his grades. Extended time was among his accommodations. In 2006-07, the student (now a 9th grader) enrolled in honors English and algebra, but in a §504 meeting, his previous accommodation plan was amended to exclude extra time on class work, homework, and classroom tests in his honors classes (although these same accommodations continued to apply to his other classes). Interestingly, the resistance to accommodate did not come from the honors classroom teacher (as is generally the case, due to concerns over diluting the accelerated class' curriculum) but from the school's §504 Coordinator, who took the position that academic accommodations were not possible in the honors class and that if the work could not be done, the student should be placed in regular education classes. The rationale provided by the §504 Coordinator was that:

(1) The school needed to provide behavioral, medical/physical accommodations in honors classes (distraction-free seating, behavior plans, scribes for students with broken arms, etc., but that "changing the testing requirements would effectively change the criteria for the honors program."
(2) Academic accommodations "are appropriate in 'regular' classes that assess the basic core curriculum standards that are not advanced or enhanced in regard to academic expectations."
(3) Finally, "in her opinion, it would be direct contradiction to declare that a student has a limitation in learning, yet place them in an academic honors program."

OCR disagreed with the coordinator's thinking, citing its December 2007 letter and data that Section 504 plans providing academic accommodations (including extra time on class work and homework) were provided to five other students, but not this one.

See also, Plano (TX) Indep. Sch. Dist., 116 LRP 13429 (OCR 12/02/15) (The student alleged that school personnel "refused to implement the provisions of her IEP in her Honors English class. Specifically, she was denied the ability to retake failed quizzes or tests because, according to the honors English teacher, "it was against the English department's policy to allow any students to retake quizzes or tests in honors or advanced placement English courses." The school agreed to remedy the error by allowing the student to show mastery of content covered in the quizzes and tests in the semester exam.).

3. A federal court's view

A more restrictive view from a federal court: A gifted program and reasonable accommodation. *G.B.L. v. Bellevue Sch. Dist. #405,* 60 IDELR 186 (W.D. Wash. 2013). A special education eligible student with ADHD and sensoneural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace," despite "an entrance score one point below the requirement." **During the summer prior to PRISM, a new IEP was developed that included 48 accommodations and modifications and nine special education services.** While the year started well, "both his grades and mood quickly declined over the course of the school year." When things got rough, the parents requested additional accommodations that were refused, and the district suggested that the student leave the program. Before the district took action to move the student, the parents unilaterally placed him in a private school and filed this action seeking reimbursement. The court explains the reasonable accommodation analysis that it will apply to resolve the dispute.

"Under the ADA and Section 504, 'an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.' *Zukle v. Regents of the Univ. of Cal.,* 166 F.3d 1041, 1046 (9th Cir. 1999) *(citing Alexander v. Choate,* 469 U.S. 287, 300 (1985)). If the Plaintiffs meet 'the burden of producing evidence of the existence of a reasonable accommodation that would enable [the Student] to meet the educational institution's essential eligibility requirements,' the burden shifts to the District 'to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards.' *Id.* at 1047. The District 'may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards.'"

At issue here is the school's refusal to provide two accommodations requested by the parents. Both requests arise from the student's difficulty keeping pace with the required out-of-class work. Homework was a significant problem for the student**. In his regular education classes the previous year, "which has much less homework than the PRISM program, the Student spent four hours each night doing homework."**

"The accelerated PRISM program has a critical component of homework and students are

expected to develop understanding and comprehension of the material outside of class. **The homework is also more difficult than in the regular education program.** The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problem." [Emphasis added].

Faced with the more difficult curriculum and sheer volume of material in the PRISM program, the student was unable to keep up. **His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned."** The therapist also argued that the homework burden was the student's "greatest source of stress." **The district denied the request, "finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."** The ALJ believed that the student, even with the proposed limitation, would not be successful since "the Student was already doing partial homework and was not mastering the course material." "Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material." Both ALJ and District Court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

The second request by the parents was to allow extended time on assignments. **Parents argue that the school failed to provide extended time as required in the IEP ("if extended time is need for assignment [Student] or his parent will indicate a suggested new date on the daily progress report")** since the student was failing. "The ALJ found that the Student's 'teachers uniformly gave full credit for the Student's homework regardless of when it was turned in.'" The court finds that the school provided reasonable accommodation and that the additional request for homework limitation was not reasonable. The parent's action and demand for reimbursement of private school placement was denied.

A little commentary: Was the student "otherwise qualified for the program" if his entrance scores were below the established eligibility criteria? The court notes this fact in a single sentence, without any commentary. Assuming that eligibility criteria for the program are educationally-based and are appropriate and nondiscriminatory, did the school accomplish anything by ignoring the criteria for this student?

The court notes that the district did not discuss the requested two-hour homework limitation with teachers prior to rejecting the request. During the hearing, the teachers testified that *had they been told* to limit homework, they would have complied, despite their belief that homework is a necessary part of the PRISM program. "The teachers also testified that setting a time limit would not be a good option for helping the Student be successful in the program because of the educational value in each assignment and the specific processing difficulties faced by the Student in completing homework." **The author would be concerned if the natural inclination of educators here to meet student needs overrode the school's obligation to provide educational benefit.** A student who due to services and accommodations is denied opportunity for equal access and benefit in the school's programs and activities is not, by definition, receiving FAPE. In other words, excessive or inappropriate accommodation can deny FAPE if it takes away learning opportunities from the child. Here, without the necessary homework component, the student would simply not be able to keep up. Hence, this requested accommodation, if provided, would deprive the student of opportunity to benefit in the PRISM program.

So what does all of this mean for schools seeking to comply with the IDEA and Section 504 FAPE consistent with its nondiscrimination and equal access obligations under Section 504 and the ADA? These are complex issues. Consider these takeaways in discussions between school and school attorney to develop an approach for a particular child:

1. State law must be considered as part of this analysis, as state choice programs vary in their approaches. This is especially true with respect to open enrollment or choice in a school district other than the student's resident district.

2. Students eligible under the IDEA have a right to IDEA FAPE together with the rights of nondiscrimination and equal access under Section 504 and the ADA. Those rights include equal opportunity to participate and benefit in choice schools and programs.

3. For the LEA with IDEA or 504 FAPE responsibility for the child, student access to choice schools or programs provided by the LEA without IEP team or Section 504 committee review for FAPE can result in FAPE rights being undermined by nondiscrimination rights.

4. Categorical exclusion of IDEA- or Section 504-eligible students in choice schools or programs is discriminatory.

5. Access to choice schools and programs can be restricted based on legitimate nondiscriminatory criteria tied to the choice school or program's mission or methodology. Where a student with a disability fails to meet the criteria, he can be denied admission or continued attendance in the choice school or program just as a nondisabled student who failed to meet criteria would be denied admission or continued attendance.

6. ED and the federal courts recognize that "the IDEA does not require that LEAs make all services needed by all students with disabilities available at all locations" and that some services to address low incidence disabilities can be provided in centralized locations.

7. The lack of common special education services in a choice school or program will likely not support a finding that IDEA FAPE cannot be provided there.

8. In the context of accelerated programs, ED guidance prohibits requiring IDEA- and Section 504-eligible students to give up pieces of their existing IEPs or 504 plans in order to access accelerated classes. Note that there is no discussion in this guidance letter with respect to fundamental alteration in accelerated programs.

9. ED has recognized that some students cannot be provided IDEA FAPE in their chosen school or program. Where IEP teams make individualized determinations based on student need and determine that the provision of special education FAPE cannot be provided to a particular student in a particular choice school or program, OCR has upheld the school's placement and denial of the choice school or program.

III. ADA Effective Communication Regulations and the IDEA student with an IEP

The ADA Title II Effective Communication Regulations. As part of the nondiscrimination protections of the ADA, specific provision is made for certain types of communication disorders to ensure that covered individuals enjoy "communication as effective as communication with others."

1. The district must "ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. §35.160(a)(1).

2. The district must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. §35.160(b)(1).

3. In determining what type of auxiliary aid and service is necessary, a school "shall give primary consideration to the requests of the individual with disabilities." 28 C.F.R. §35.160(b)(2).

4. The district need not, under Title II, "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. §35.164.

A. The *Tustin* Case: CART services under the ADA "Effective Communication" regulations. *K.M. v. Tustin Unified Sch. Dist.,* 61 IDELR 182 (9th Cir. 2013), *cert. denied,* 114 LRP 9909, 134 S. Ct. 1494 (2014) (D.H.); *cert. denied,* 114 LRP 9688, 134 S. Ct. 1493 (2014) (K.M.).

This case consolidates two separate appeals by two IDEA-eligible students after summary judgment was awarded to their respective districts. Both students have hearing impairments and both seek CART services. "CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both cases, the school district denied the request for CART but offered other accommodations." Both students claim that their schools' refusals to provide CART services violate both the IDEA and Title II of the ADA. Both make similar claims regarding the impact of their hearing impairments in class.

> "K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of K.M.'s teachers testified that, in their opinion, K.M. could hear and follow classroom discussion well …. K.M.'s teachers declared that she participated in classroom discussions comparably to other students. K.M. saw her situation quiet differently, emphasizing that **she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day ….** The district court stated that it was 'reluctant to adopt fully teacher and administrator conclusions about K.M.'s comprehension levels over the testimony of K.M. herself,' and found 'that K.M.'s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived.'"
>
> "D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. 'hears enough of what her teachers and fellow pupils say in class to allow her to access the general education curriculum' and 'did not need CART services to gain educational benefit …. Although D.H. can use visual cues to follow conversations, **'[u]se of these strategies requires a lot of mental energy and focus,' leaving her 'drained' at the end of the school day.** D.H.'s declaration questioned whether her teachers understood the extra effort it required for her to do well in school." (Emphasis added.)

Summary judgment was ordered against both students based on District Court findings that the respective schools had complied with the IDEA and that, therefore, the ADA claims were foreclosed by failure of the IDEA claims. **On appeal, the students did not contest the findings that their schools complied with the IDEA but urged that they nevertheless have rights under Title II of the ADA to CART on the theory that "Title II imposes effective communication obligations upon public schools independent of, not coextensive with, school's obligations under the IDEA."**

The 9th U.S. Circuit Court of Appeals agreed with the students, finding that the Title II effective communication regulations differ in both ends and means. **For example, while the IDEA FAPE is measured by meaningful benefit, the Title II rules (where there is no FAPE) address equality of opportunity to participate and benefit.** There are important differences between the two laws.

> "Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. **Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with**

communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs." (Emphasis added.)

Further, the Title II rules contain specific regulatory requirements with no IDEA counterpart.

> "The Title II effective communications regulation states two requirements: **First, public entities must 'take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.'** Second, public entities must 'furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.' The Title II regulations define the phrase 'auxiliary aids and services' for purposes of 28 CFR §35.160 as including, inter alia, 'real-time computer-aided transcription services' and 'videotext displays. **In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.'"**
>
> A separate, more general Title II regulation limits the application of these requirements: Notwithstanding any other requirements in the regulations, **a public entity need not, under Title II, 'take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.'"** (Internal citations omitted, emphasis added.)

Given the differences between the statutes, the notion that provision of IDEA FAPE will preclude a Title II claim in all cases is simply incorrect. "The result is that in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA …. We must reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her Title II claim. As a result, courts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework."

Both cases were remanded to the respective District Courts to determine the students' rights to CART under Title II. One District Court has issued an opinion.

D.H. v. Poway Unified Sch. Dist., 62 IDELR 176 (S.D. Calif. 2013). On remand following the 9th U.S. Circuit Court of Appeals decision discussed above, D.H. sought a preliminary injunction from the District Court that would order her school district to provide CART services during the pendency of the litigation. No oral argument or evidentiary hearing was held with respect to the motion. At the time of the motion, D.H. was a high school senior, set to graduate in 2014. The District Court provided some additional facts not revealed in *Tustin.*

> "She has moderate-to-profound hearing loss, and a cochlear implant in her right ear and uses a hearing aid in her left ear …. **She uses speech and listening as her primary mode of communication ….** She relies on visual strategies, such as lip reading and observation of the actions of her peers, as well as educated guesses to fill in for sentences that she does not hear. She is not always aware of when she has not heard something."

While it had not provided CART, the district had provided significant aids and services to address the student's hearing issues:

> "Deaf/hard of hearing ('DDH') services; audiological services; speech language services; and extended school-year services. The assistive technology devices included, but were not limited to, an FM amplification system for the classroom and school assemblies, a pass-around microphone, and closed-captioning access during class videos."

> "The communication strategies, accommodations, and modifications called for in the IEP included, but were not limited to, written directions, access to copies of peers' notes, consistent home/school communication, access to quiet work environments, classroom doors closed to eliminate noise, teachers repeating/rephrasing other students' responses, extra time for some assignments, and preferential seating."

D.H. alleged that the district's offered services were ineffective, and she was left with headaches due to intense concentration and her straining to hear what was being said in class. Specifically, the "meaning for meaning" transcription provided by the school was "so confusing to D.H. that she would rather have no transcription at all then have to use the alternatives." CART, on the other hand, makes it very easy for her to find exactly what she missed "and pick right back up with what is being said." Further, the district's accommodations including closed captioning, the FM system, passing around a microphone, and even teacher repetition or rewording of class comments were not provided consistently as promised.

The district's attempt to show overall educational success as evidence of equally effective communication likewise failed.

> "While it is undisputed that D.H. is doing well in school, the District fails to explain how this shows that it complies with the ADA effective communication regulation in light of D.H.'s ongoing difficulties. **These difficulties, which result in both physical and psychological pain, tend to show that the District does not communicate with D.H. in a manner 'as effective as [it] communicat[es] with others.'** 28 C.F.R. §35.160(a)(1)." (Emphasis added).

The District Court granted the injunction request, finding that the student was likely to show that the district had not met its obligations under the ADA.

A little commentary: Since the Title II regulations take a civil rights approach and require: (1) equality between disabled and nondisabled students with respect to effective communication at school; and (2) that the school furnish appropriate auxiliary aids and services to provide equal participation and benefit, it seems a bit odd that the court's decision did not include any apparent determination of the effectiveness of the communication between the school and nondisabled students or analysis of the level of participation and benefit enjoyed by nondisabled peers. As detailed below, the absence of that analysis may arise from the ADA's assumption that the disabled individual is in the best position to know his or her needs for accommodation, and the burden on the school to show that some other accommodation, service, or device is equally effective.

The court seems to equate the plaintiff student's effort (and the impact of that effort on the student) with a lack of equality in effective communication. At the very least, the student's academic success seems to evidence that communication with classroom teachers was effective (assuming that her passing grades are actually indicative of skill acquisition and benefit) *without the use of CART services.* While the evidence indicates that the plaintiff student was missing pieces of the classroom discussion, we have no benchmark to compare how much of the classroom instruction and discussion her nondisabled peers were missing (what level of participation and benefit did nondisabled peers enjoy with respect to classroom instruction and discussion, *and how did the Plaintiff student compare?*). In short, how can one determine equality with nondisabled peers *without a comparison to nondisabled peers?* **The law does not require "effective communication." It requires *"as* effective communication."**

A final note: The district's motion for reconsideration of the decision on the basis of the plaintiff's failure to exhaust administrative remedies was denied. The court concluded that while the district had raised the issue in its answer, the affirmative defense had not otherwise been argued during the litigation. *D.H. v. Poway Unified Sch. Dist.,* 62 IDELR 200 (S.D. Calif. 2014). At the District Court, the plaintiff did not allege a violation of IDEA FAPE but argued that the school's attempts to address her impairment were ineffective. Note the absence of an allegation of denial of IDEA FAPE due to

ineffective aids and services in the remand (because Plaintiff lost on that issue previously in District Court).

B. DOJ, OCR, & OSERS Joint Guidance on Effective Communication

In response to the *Tustin* case, three federal agencies with jurisdiction over the IDEA, the ADA, and Section 504 intersection joined together to issue a guidance letter providing assistance to schools attempting to comply with the ADA's Effective Communication requirements in the public schools. *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Pub. Elem. and Secondary Schs.,* 114 LRP 49205 (DOJ/OCR/OSERS 11/12/14) (hereinafter, "2014 Guidance"). Extensive highlights from the guidance are reproduced here, with footnote references removed for ease of reading.

1. *Sometimes* an IDEA IEP will be enough to satisfy Title II, *but not always.* "Public schools must apply both the IDEA analysis and the Title II effective communication analysis in determining how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability. In many circumstances, an individualized education program under the IDEA will also meet the requirements of Title II. However, as a recent Federal court decision highlighted, the Title II effective communication requirement differs from the requirements in the IDEA. In some instances, in order to comply with Title II, a school may have to provide the student with auxiliary aids or services that are not required under the IDEA. In other instances, the communication services provided under the IDEA will meet the requirements of both laws for an individual student." Id., p. 2.

Can a student be asked to give up ADA rights because she's in special ed.? No. "A student with a disability does not, and cannot be asked to, give up his or her rights under Title II in exchange for, or because he or she already receives, special education and related services under the IDEA. That is, the provision of FAPE under the IDEA does not limit a student's right to effective communication under Title II." *2014 Guidance,* p. 11.

So schools have to satisfy the requirements of both the IDEA and the ADA and protect the student's rights under both laws? Yes. "For a student with a disability who is covered under both laws—such as all IDEA-eligible students with hearing, vision, or speech disabilities—the school district must ensure that both sets of legal obligations are met, and that none of the student's rights under either law are diminished or ignored." Id., p. 11.

A little commentary: Just as a service animal or other equal access accommodation can interfere with the IDEA, so too can an effective communication aid or service. While the 2014 Guidance is heavy on ADA compliance, IDEA FAPE must be satisfied as well.

2. How does the student or parent make a request for auxiliary aids or services under Title II? Title II does not designate a contact person or the process of determining aids and services. The school must provide this structure. Once the school determines the identity of this contact and the process to pursue when making a Title II request, the school should "make sure that the identity and contact information of the designated school official is made publicly available in accessible formats." *2014 Guidance,* p. 12. **The guidance encourages schools (as best practice) to "proactively notify parents and students about the right to effective communication under Title II," including contact information for the school official to contact should the parent/student desire to make a request for services.** School staff should also be aware of the designated official so that employees may forward requests appropriately.

Could the IEP team be designated for this purpose? Yes. "If a child has an IEP, neither the IDEA nor Title II require that the child's IEP Team address a parent's Title II request for his or her child; however, a school district may choose to delegate this responsibility to the child's IEP

Team." *2014 Guidance,* p. 12. "Under the IDEA, the school must ensure that the child's educational program, as part of FAPE, is based on the individual needs of the child and is reasonably calculated to enable the child to receive meaningful educational benefit. **If a school district designates the IEP Team as having the responsibility of making decisions about the auxiliary aids and services required under Title II, then the IEP Team may make this decision."** *2014 Guidance, p.* 13. (Emphasis added).

But the IEP team will *NOT* use FAPE analysis for determining Title II services. "However, the IEP Team needs to be aware that the decision regarding the auxiliary aids and services needed to ensure effective communication as required under Title II poses a different question than the FAPE determination under the IDEA and must be made using the Title II legal standards." Id.

A little commentary: The author believes that delegating this authority to the IEP team is critical. After all, the student's rights under both the IDEA and the ADA/504 must be satisfied. Further, there are complications when someone or some group other than the IEP team performs the function. **For example, what if the school believes that the effective communication choice by the parent will prevent the student from developing the skills targeted by IEP goals?** Wouldn't such a choice potentially violate FAPE? **Is it possible that the parent is seeking the service, accommodation, or device through ADA because a request for same was denied by the IEP team?** Is it also possible that the IEP team never had a chance to weigh in? In both *Napoleon* and *Cave,* discussed previously, equal access by way of service animal could impact or interfere with IDEA FAPE, requiring the use of the IDEA administrative process to work through the interplay as well as provide the parents a mechanism for challenging and appealing IEP decisions on the issue. **Regardless of the finding with respect to ADA, the IEP team will need to make a finding as to whether the service or device is necessary for FAPE.** If so, it should be added to the IEP. If not necessary for FAPE, the IEP team would need to determine whether the aid or service is required under the effective communication rules. *Tustin* and the guidance makes clear that the school cannot assume that IDEA FAPE always satisfies effective communication. That decision must be made on a case-by-case basis. **If a device is required by effective communication but not required for FAPE, the IEP team will need to determine whether the aid or service negatively impacts FAPE.**

3. Does the parent have to ask for Title II aids or services? No, the school has affirmative duty to raise the issue. "Parents do not have to make a specific request for different or additional auxiliary aids. **When the school district knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, the school district also has an affirmative obligation to provide effective communication under Title II, whether or not a parent requests specific auxiliary aids and services under Title II.** This obligation is in addition to the requirement that the school district make FAPE available if the student is eligible under the IDEA. As a best practice, schools should consult with the parent or guardian (and students, as appropriate) at the first opportunity regarding what auxiliary aids or services are appropriate and update information about these preferences at least every year or whenever the parent or guardian requests a change. Nothing prevents the parent, guardian, or student from specifically requesting a particular auxiliary aid or service if not so consulted." *2014 Guidance,* p. 12. (Emphasis added).

A little commentary: To satisfy the affirmative obligation to provide effective communication, the IEP team, having been delegated the authority as suggested above, will need to add effective communication analysis to the IEP meeting agenda (on an on-going basis) for students with vision, hearing, and speech disabilities.

4. Primary consideration must be given to the student's preference. "Title II requires covered entities, including public schools, to give 'primary consideration" to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student." *2014 Guidance,* p. 6.

How is that preference communicated? "When determining what is appropriate for that student, **the school must provide an opportunity for the person with the disability (or an appropriate family member, such as a parent or guardian) to request the aid or service the student with a disability thinks is needed to provide effective communication.** It is the person with the disability (or his or her appropriate family member) who is most familiar with his or her disability and can provide relevant information about which aids or services will be most effective." (Emphasis added).

> "For example, if a high school student was deaf at birth or lost his or her hearing before learning language, that person may use American Sign Language (ASL) as his or her primary form of communication and may be uncomfortable or not proficient with other forms of communication. A high school student who lost his or her hearing later in life and who uses a cochlear implant may not be as familiar with sign language and may feel most comfortable and proficient with an oral interpreter or with the use of a computer or other technology. A young student who is nonverbal and is fluent in ASL but cannot read yet may not be able to use a computer with written text and may be most comfortable and proficient communicating with a sign language interpreter." *2014 Guidance,* p. 7-8.

A little commentary: Should the school utilize the IEP team process for reviewing these requests and considering needs for equally effective communication, the requirement to provide meaningful participation would seem to address this concern as long as the parent is aware of the IEP team's role. Note that the ADA places great weight on the disabled person's information about which service, device, etc., will be most effective. That approach is somewhat at odds with the IDEA's data-based approach to disability services. Note that the ADA does not require the IEP team to ignore evaluation data. Instead, the ADA simply gives priority or primary consideration to the student's/parent's information about which aids or services to provide.

5. What factors does the school consider in determining necessary Title II aids and services to provide equal opportunity to participate and benefit? "The determination of what auxiliary aids or services will provide effective communication must be made on a case-by-case basis, considering the communication used by the student, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place …. Schools must make an individualized determination and cannot assume, for example, that simply because a student is deaf, the student is fluent in ASL."

> "In addition to giving primary consideration to the particular auxiliary aid or service requested by the student with a disability, the public school should also consider, for example, the number of people involved in the communication, the expected or actual length of time of the interaction(s), and the content and context of the communication. For example, will the communication with a deaf student be fairly simple so that handwritten or typed notes would suffice; or is the information being exchanged important, somewhat complex, technical, extensive, or emotionally charged, in which case, a qualified interpreter may be necessary." *2014 Guidance,* p. 8.

6. Does the school have to address all communications involving the student at school? Yes. "The Title II regulations' requirements apply to all of a student's school-related communications, not just those with teachers or school personnel. Therefore, given the ongoing exchanges students experience with teachers, students, coaches, and school officials, any student who requires a sign language interpreter in order to receive effective communication in an academic class would likely need interpreter services throughout the day and may also need them to participate in school-sponsored extracurricular activities." *2014 Guidance,* p. 8.

What does it mean for auxiliary aids and services to be provided in 'accessible formats, in a timely manner, and in such a way as to protect the privacy and independence' of a student with a disability? "The Title II regulations require that when a public school is providing auxiliary aids

and services that are necessary to ensure effective communication, they must be provided in 'accessible formats, in a timely manner, and in such a way as to protect the privacy and independence'" of a student with a disability. This regulatory provision has several requirements.

- "First, the auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. If homework assignments are available on-line, then the on-line program used by the school must be accessible to students who are blind. Similarly, for a student with limited speech who does not yet read, a computer that writes words would not be accessible for that student. Instead, a device that uses pictures to communicate words, thoughts, and questions may be appropriate."

- "Second, the auxiliary aid or service must be provided in a timely manner. That means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it (or the alternative, as discussed above) as soon as possible. If the student is waiting for the auxiliary aid or service (as opposed to requesting and arranging for it in advance), DOJ and ED strongly advise that the public school keep that student (and parent) informed of when the auxiliary aid or service will be provided. This requirement is separate from the provision of special education and related services under the IDEA. **For example, where the student or his or her parent(s) requests auxiliary aids and services for the student under Title II, the appropriate aids and services must be provided as soon as possible, even if the IDEA's evaluation and IEP processes are still pending." (Emphasis added).**

A little commentary: This piece of guidance, in the context of a student with an initial evaluation under the IDEA pending, creates an interesting data problem for the school. The student's preference of aid or service must be addressed prior to the completion of the evaluation and thus before the school may have the data necessary to counter what could be excessive or inappropriate requests. Once the aid or service is in place, making changes afterwards, even with fresh data to substantiate the change, can be difficult. Note that the guidance cites no authority for the "ASAP" response. *See additional commentary below following the case study.*

- "Third, the auxiliary aid or service must be provided in a way that protects the privacy and independence of the student with the disability. For example, for someone who is deaf and uses ASL, if other people in the environment understand ASL, then conversations that involve sensitive information must be conducted privately. Additionally, auxiliary aids and services must be provided in a manner that does not unnecessarily disclose the nature and extent of an individual's disability. For example, if a student who is hard of hearing needs assistance with taking notes, a teacher should not call out for volunteers in the front of the whole class. Auxiliary aids and services also must be provided in a way that protects the independence of the student. For example, if a blind student requested an accessible electronic book (e-book) reader to complete in-class reading, instead of using a reading aide, the school district should provide the e-book reader because it would allow the student to go through the material independently, at his own pace, and with the ability to revisit passages as needed." *2014 Guidance, p. 9-10."*

A little commentary: By way of example on the issue of privacy and independence, consider *Seattle (WA) School District No. 1,* 67 IDELR 22 (OCR 2015). The parent of a student with a hearing impairment complained, in part, that when the student needed to make a phone call at school, "he is required by the district to ask someone else to make the call from the school office, where there is no privacy, and that person then relays the conversation between the student and his mother." The district's 504 coordinator told OCR that there are no buildings in the district that have an accessible telephone for deaf or hard of hearing students, but most students use their own

cell phones to text or call between classes. As part of its voluntary resolution agreement, the district agreed to consult with the parent and determine how to provide effective communication between the parent and student in a manner that protects the student's privacy and independence.

7. Can the school figure out Title II services as part of the IDEA initial evaluation? Sure, says the guidance, as long as you don't wait to address the Title II offerings until the IDEA initial evaluation is complete. "A school district must provide the auxiliary aids or services in a timely manner and cannot wait for the IEP process to run its course before providing necessary auxiliary aids and services under Title II. The IDEA does not prohibit a school district from providing the needed auxiliary aids and services under Title II while the IDEA evaluation is pending." *2014 Guidance,* p. 14. Upon completion of the initial evaluation, the previously provided Title II aids and services would then be reviewed in the context of the completed IDEA evaluation. Id.

A little commentary: See previous commentary in #6 regarding the timing of the decision.

8. What if another service or aid can provide equally effective communication? "The public school must honor the choice of the student with the disability (or appropriate family member) unless the public school can prove that an alternative auxiliary aid or service provides communication that is as effective as that provided to students without disabilities. **If the school district can show that the alternative auxiliary aid or service is as effective and affords the person with a disability an equal opportunity to participate in and benefit from the service, program, or activity, then the district may provide the alternative."** *2014 Guidance,* p. 8 (emphasis added).

A little commentary: Note that rejection of the student's choice places the burden of proof on the school as to the effectiveness of the school's proposed alternative aid or service. This burden is fascinating since the ADA decision has to be made, per the guidance, *prior* to the school having a completed initial evaluation that would give the school the necessary proof.

9. Can IDEA funds be used to pay for Title II auxiliary aids and services? "IDEA funds may be used only to pay for auxiliary aids and services under Title II that also are required to be provided under the IDEA, such as assistive technology or interpreter services that are included in the student's IEP. If a child receives auxiliary aids and services under Title II that are not included in the child's IEP, IDEA funds may not be used to pay for those services." *2014 Guidance,* p. 15.

A little commentary: The funding problem is especially problematic, as the aids and services necessary for FAPE can be quite expensive, and the ADA rules seem to require what may sometimes be conflicting or redundant aids or services *(see D.H. v. Poway, supra)*. The result is that despite the IEP team's ability to choose among appropriate services for FAPE, the student's choice under the ADA may be the *de facto* decision should the school want to reduce duplicative expenses. Why provide both sign language interpreter and CART? That financial pressure can implicate student progress on goals (why develop signing skills if CART is provided?), implicating FAPE.

10. How does the school determine fundamental alteration or undue burden? This decision is left to central administration — "the head of the school district or his or her designee (i.e., another school official with authority to make budgetary and spending decisions)." **The decision is made in writing, including a written explanation of why the aid or service would cause an undue burden or fundamental alteration.** "Compliance with the effective communication requirement would, in most cases, not result in undue financial or administrative burdens." *2014 Guidance,* p. 10.

Could the IEP team do this? The guidance indicates that *someone on the IEP team* (but not the team itself) could serve in this role. "While there is nothing in the ADA that would prevent the head of the school district from delegating this authority to an appropriate member of the child's IEP team, that designee must have authority to make budgetary and spending decisions and must have the knowledge necessary to consider all resources available to the school district for use in the funding

and operation of the service, program, or activity." *2014 Guidance,* p. 10.

A little commentary: As noted above, the author believes that the IEP team must be involved in these decisions. Since the IEP team itself cannot be delegated the authority to determine fundamental alteration, designating the administrator on the IEP team to perform that function is the next best thing. After all, only the IEP team can determine the student's FAPE services, and the same IEP team can be delegated the task of determining ADA effective communication aids and services. The peril of not involving the IEP team is clear in the guidance letter's case study discussed below.

11. If school proves fundamental alteration or undue burden, what happens next? The district "must take other steps that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, the individual with a hearing, vision, or speech disability can participate in, and receive the benefits or services provided by, the school district's program or activity. Generally, this would involve the provision of an auxiliary aid or service that would not result in a fundamental alteration or undue burden." *2014 Guidance,* p. 10.

12. A Guidance Letter Case Study. The following is a case study included in the Joint Guidance Letter. It addresses the underlying point of *Tustin* that auxiliary aids and services under Title II may be different from special education and related services under the IDEA. It is instructive on many levels. The author has added brief paragraph tags in a few places where the guidance letter did not.

> **The Student.** "Tommy is a thirteen-year-old student with significant hearing loss. He has a cochlear implant, and also relies on lip-reading and social cues to communicate with others. He has been evaluated under the IDEA and determined eligible for special education services."
>
> **The Task.** "When addressing the communication needs of a child who is deaf or hard of hearing, the IEP Team must consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode. The IEP Team also must consider whether the child needs assistive technology devices and services."
>
> **The Problem.** "For the past three years, Tommy's IEP Team, which includes Tommy's parents, agreed that Tommy would use FM technology, which consists of a microphone held by the teacher and a receiver that transmits to Tommy's implant. During this time period, Tommy has maintained above average grades, completed grade level work, and interacted appropriately with his peers. Recently, however, Tommy expressed concern that he cannot hear other classmates during class discussions and often must 'fake it.' He also stated that the FM system transmitted static and background noises and interfered with his ability to focus. Based on these concerns Tommy's mother requested that he receive communication access real-time translation (CART) services, which is an immediate transcription of spoken words to verbatim text on a computer screen."
>
> **"FAPE determination under the IDEA:** After Tommy expressed his concerns about the FM system and requested CART services, Tommy's IEP team timely reconvened. Under the IDEA, the IEP team must determine the special education and related services necessary to provide FAPE and ensure those services are reasonably calculated to enable Tommy to receive meaningful educational benefit. Included in this analysis is whether CART services are necessary for Tommy to receive FAPE. Based on Tommy's above average grades, his grade-level work, and teachers' reports on Tommy's interactions in class with his peers, the IEP team determined that transcription services (e.g., CART) were not necessary for Tommy to receive FAPE. The IEP team did, however, recommend that Tommy receive an updated FM system and preferential seating in classrooms, and that teachers repeat student's comments, use closed-captioning videos, and provide Tommy with course notes."

"Effective Communication determination under Title II: Because Tommy is a student with a hearing disability already identified under the IDEA, the school district also has an affirmative obligation under Title II to ensure that he receives effective communication. Under Title II, the school district must take appropriate steps to ensure that communication with Tommy is as effective as communication with students without disabilities. The school district also must provide appropriate auxiliary aids and services, where necessary, to afford Tommy an equal opportunity to participate in, and enjoy the benefits of, the school program. In determining what auxiliary aids and services are appropriate for Tommy, the school must give primary consideration to the requests made by Tommy and his parents."

The District ADA Coordinator's Decision. "Tommy's school district has delegated the responsibility of determining the appropriate auxiliary aids and services needed to ensure effective communication to the ADA coordinator. As soon as Tommy made his request, his teacher alerted the ADA coordinator about Tommy's request for CART services. In this case, Tommy cannot hear many of the students in the classroom, and by not hearing a student's question or comment, he does not always understand a teacher's response. **The ADA coordinator timely determined that because Tommy cannot fully hear or understand all that is said in the classroom, he is not receiving effective communication.** The Coordinator gives primary consideration to Tommy's request for CART services and agrees that CART services would provide Tommy with effective communication. **Because the CART services would not result in a fundamental alteration or in undue financial and administrative burdens,** Tommy will receive CART services as an auxiliary service under Title II and not as a related service under the IDEA." (Emphasis added).

A little commentary: The author is concerned by some the assumptions made in the case study, as well as the recommended approach of using the ADA coordinator to make effective communications decisions for IDEA-eligible students. **The following concerns ought to be discussed with the school attorney as the school seeks to create an appropriate process to address these rules.**

1. **To comply with the ADA requirements, how effective does the resulting communication have to be?** The language of the regulation requires the school to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are *as effective as communications with others."* The language is that of civil rights. The law's focus is on ensuring that whatever level of communication is enjoyed by nondisabled students at school is also provided to students with disabilities (specifically, hearing, vision, and speech impairments). The plain language requires a comparison.

   Interestingly, neither the District Court in the remand in *Tustin* nor the 2014 Joint Guidance Letter seem to give much attention to the comparative nature of the effective communication analysis — that is, how effective is the school's communication with nondisabled students? For example, in the *D.H.* remand from *Tustin,* there was no apparent attempt by the District Court to determine how effective the school's communication was with nondisabled peers. Instead, the court simply focused on the fatigue and stress resulting from the student's focus to hear in the classroom environment. Since she was having difficulty, the court simply concluded that communication with her was not effective. The school does not seem to have proposed a standard by which to compare her to nondisabled peers. Perhaps more troublesome is the example created in the 2014 Joint Guidance where the ADA coordinator determined that "because Tommy cannot fully hear or understand all that is said in the classroom, he is not receiving effective communication." There is no indication that this standard is created through data-gathering or analysis. It is simply the pronouncement that "as effective" communication must be "perfect communication."

   Note that in other fact situations, OCR has applied a real-world Section 504/ADA standard with which to compare the student with disability. Consider this approach in determining how safe the school environment should be for a student with a peanut allergy. In response to a

complaint by a student with a severe allergy to peanuts and tree nuts, OCR reminded schools of the nondiscrimination duty as it pertains to student safety. *Washington (NC) Montessori Pub. Charter Sch.,* 60 IDELR 78 (OCR 2012). Following a brief overview of the relevant nondiscrimination provisions, OCR provided the following:

> "OCR interprets the above provisions to require that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, **Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.** Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program."

See also the very similar language in an earlier OCR letter, Saluda (SC) Sch. Dist. One, 47 IDELR 22 (OCR 2006) ("OCR interprets these provisions to require that public school districts take those steps necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. **As the vast majority of district students without disabilities do not face a significant possibility of experiencing serious and life-threatening reactions to their environment while they attend District schools, Section 504 and Title II require that the District provide the student with an environment in which he also does not face such a significant possibility."** (Emphasis added)).

Schools wishing to demonstrate that they have met the effective communication standard should seriously consider methods to determine how much is both heard and understood by nondisabled peers. **The author respectfully argues that this benchmark cannot be that nondisabled students hear everything and understand everything that occurs in a classroom.**

2. **What will the school do with respect to timing of the ADA decision and the data to be reviewed to make the decision?** The case study provides an interesting backdrop for a discussion of the data problem and the timing problem. Note that even though the communication pieces of the IEP were not working perfectly, the student was not being denied FAPE. Nevertheless, the IEP team made changes to the IEP calculated to address the problems. There is no indication that the ADA coordinator reviewed any assessment data from the IEP team, knew that changes had been made to the IEP to address the parent's concerns, or, perhaps most importantly, knew whether the changes made now satisfied the effective communication requirement. Even if the coordinator had the data, the IEP team will still be in a better position to make the ADA effective communication decision and no one will be better qualified than the IEP team to determine possible impact on IDEA FAPE. In the author's opinion, any decision-maker other than the IEP team seems risky.

   While the case study indicates that the parent's request was immediately forwarded to the ADA coordinator, such speed (especially where changes to the IEP have yet to be reviewed for effectiveness) seems rather reckless with respect to expenditure of district funds. **Interestingly, while the Joint Guidance insists on ASAP decisions for effective communication, no authority is cited for the proposition. Further, OCR has traditionally expected that 504/ADA processes occur within a reasonable time and that in the absence of a specific timeline, the school could look by analogy to state IDEA timelines.** *See, for example, Rockbridge County (VA) School Division,* 57 IDLER 144 (OCR 2011) (OCR provided the following guidance. "Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment, but requires that an evaluation be conducted within a reasonable period of time." A "reasonable time" is generally viewed as the time allowed by IDEA rules for similar events — i.e., how long does your state

allow between consent and completion of the evaluation? *See also, Rose Hill (KS) Pub. Schs., Unified Sch. Dist. #394,* 46 IDELR 290 (OCR 2006) (While there is no timeline in the §504 regulations with respect to completion of an initial evaluation, "the various steps in the process, which includes the evaluation, must be completed in a reasonable period of time. Unreasonable delay may be discrimination against a student with a disability because it has the effect of denying the student meaningful access to educational services."). Applying the traditional OCR rule would allow an initial IDEA evaluation to be reviewed before making the decision on effective communication and would also allow a time period following changes to the IEP to go into effect before adding considering additional services.

District evaluation responsibilities as a provider of adult education? *Oakland (CA) Unified Sch. Dist.,* 38 NDLR 234 (OCR 2008). OCR determined that as a provider of adult education, "the District must take the needs of qualified Finally, note that OCR has actually required schools to gather data to address communication needs in adult students. disabled adults into account in determining the aids, benefits, and services it provides through its Program classes at TIW/Arc." Applying ADA effective communication rules, OCR added that the district must take "steps to ensure that communication with these students is as effective as communication with others, and must furnish appropriate auxiliary aids and services where necessary to afford them an equal opportunity to participate."

> "The Section 504 and Title II regulations require that the District take into account the communication needs of each [ ] Program student enrolled in District classes located at TIW/Arc, that communication in these classes be effective for these students, and that appropriate auxiliary aids and services be provided for them. This knowledge of the needs of the students cannot be effectively acquired through ad hoc measures. In order to meet these responsibilities, the District must have a concrete process in place to reliably ascertain each student's method(s) of communication and skill level in the context of the type and complexity of information being conveyed in various Program classes. The District cannot effectively 'take into account' a student's communication needs without first accurately identifying what they are. Similarly, it cannot provide for effective communication in the classes, including necessary auxiliary aids and services, without first obtaining information about how the student communicates."

A little commentary: While the adult ADA/504 world does not have a regulatory duty to child find or evaluate, OCR seems to assume that these duties exist in the adult education context here. Note further that OCR's concerns did not end with understanding the communication needs of adult students. Once the district identified the needs, it was required to determine what types of aids and services were required to effectively and appropriately meet the communication needs of adult students, and provide such aids and services in a timely manner. In the adult ADA/504 world, these decisions are typically triggered and led by the adult student, not the school. This case seems entirely at odds with the guidance on not waiting for evaluation data being developed under IDEA, and making the ADA decision first.

Response to the Joint Guidance Letter from the National School Boards Association (NSBA). On March 5, 2015, the NSBA sent a 10-page request for clarification to OCR, the DOJ, and OSERs on the practical issues involved in implementing the effective communication guidance letter. The letter can be downloaded at *http://www.nsba.org/ocr-june-2015-response-nsbas-march-2015-letter-re-ocrs-november-2014-dear-colleague-letter-title-ii*. While attempting a collegial tone, the letter pointedly asked for authority underlying various assumptions made in the guidance (including why a 9th Circuit decision is now the basis for compliance across the country), help determining how the IEP process can be protected, how fundamental alteration is demonstrated, and details on undue financial and administrative burden (which OCR has not been keen to recognize as even relevant in Section 504 analysis). In June of 2015, the DOJ, OCR, and OSERS responded to the NSBA in a very brief letter that did not address the specific

issues and concerns raised by the NSBA but instead redirected the NSBA to the guidance letter itself. *Letter to Negron,* 65 IDELR 304 (2015).

What to do? Where Section 504 equal access or Title II effective communication demands can result in services, accommodations, or access to devices without an IEP team review, these demands could implicate and frustrate IDEA FAPE. Consequently, when demands are made by IDEA-eligible students for services, accommodations, or devices pursuant to Title II or Section 504, consider involving the school attorney in the discussion to ensure that the IDEA FAPE is preserved and the other two laws are respected as well.

Consider this basic framework in discussions between school and school attorney:

1. For the IDEA-eligible student, requests for services, devices, or notice of use of a service animal should go to through the IEP team first. Since the duty to consider effective communication is ongoing, the author believes that the IEP team should add discussion of effective communication to annual reviews.
2. The IEP team should determine:
   a. Is it necessary for IDEA FAPE? If so, the IEP team adds it to the IEP and provides it.
   b. If not necessary for IDEA FAPE, is it required under Section 504 or Title II?
      (1) If required under Section 504 or Title II and the request does not negatively impact IDEA FAPE, provide the appropriate accommodation and make changes to policy, practice, and procedure to make the request possible. Talk your school attorney about documenting the school's response.
      (2) If required under Section 504 or Title II, what does the school do if the request negatively impacts IDEA FAPE? Talk with your school attorney about the appropriate options. For example, should the school refuse the request on the basis of fundamental alteration? Should the school provide prior written notice to the parent identifying areas where growth under the IEP will be prevented or limited due to the parent's ADA choice? What other options might be available?